

United States
Court of Appeals
for the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY, a cor-
poration, Appellant,

vs.

JAMES A. NITCY, Appellee.

JAMES A. NITCY, Appellant,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY, a cor-
poration, Appellee.

Transcript of Record

Appeals from the United States District Court for the
District of Idaho, Northern Division

FILED

SEP 8 1954

PAUL P. O'BRIEN
CLERK



No. 14421

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for the Ninth Circuit

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PACIFIC RAILROAD COMPANY, a cor-
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[Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Appellee-Appellant.



In the United States District Court for the North-
ern District of Idaho

No. 1914

JAMES A. NITCY, Plaintiff,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY,

Defendants.

COMPLAINT

Now comes the plaintiff and for cause of action alleges:

I.

That this action arises under the act of Title 45, USCA, Section 51 to 60 and Title 45, USCA, Section 1 to 23; more than \$3000.00 is in controversy.

II.

During all times herein mentioned, the defendant was a Wisconsin corporation, not licensed to do business in the State of Idaho or having appointed a statutory agent in the State of Idaho and owned and operated in interstate commerce, a railroad running through the City of St. Maries, County of Benewah, State of Idaho.

III.

That in connection with the railroad at said point, the said defendant maintained and operated a round-house and that engines and cars, operating in interstate commerce, were serviced and repaired at said round-house; that the plaintiff was employed as a laborer in said round-house and worked

in and about engines and cars that were used in interstate commerce; that at all times hereinafter mentioned, the said plaintiff was so engaged.

IV.

That on or about February 10, 1950, the defendant, through its agent, Nels Stromberg, required the plaintiff to transport a fifty gallon drum of oil on a two-wheel hand truck; that said plaintiff was pulling said hand truck and Harry Bogardus was pushing said hand truck; that said oil was to be used for cleaning engines operated in interstate commerce; that Harry Bogardus was pushing said car or dolly with the said drum of oil in an up right position; that the said fellow servant, Harry Bogardus negligently pushed the said drum of oil to a horizontal position upon the ground near a platform upon which the drum was to be loaded, making it necessary for plaintiff to lift the drum to an up right position; that the said drum was dropped into sand; that in lifting said drum to an up right position for the purpose of loading the same upon said platform, the said plaintiff seriously strained his back; that the said defendant by and through its agents was negligent in the following respects:

1. In failing to keep said drum in an up right position.
2. In maintaining a soft surface from which to lift drum upright.
3. In failing to provide a solid footing near said platform.

V.

The facts stated in Paragraph IV hereof are

hereby realleged as though the same were set out herein in full; that the said defendant failed to provide proper tools and failed to comply with its own safety rules as follows:

1. Failed to provide proper equipment or any equipment for lifting drums of oil on to said platform.

2. In failing to make a report of the accident as required of the foreman by that certain rule book entitled, "Safety Rules for Employees in the locomotive, car and store departments", printed and published by defendant and distributed to its employees.

3. In failing to provide proper medical attention for the said plaintiff.

VI.

That Nels Stromberg was the foreman in and about the said round house owned and operated by said defendant and he was their duly authorized agent in overseeing and directing work in and about said round house; it was the usual custom of Nels Stromberg to require the defendant's employees to do and carry on work for which they were not qualified; that the plaintiff was employed as a laborer and was not classified or qualified to carry on work other than work of a laborer; that on or about October 13, 1950, and while plaintiff was still under treatment by defendant's doctor, Doctor Repp of St. Maries, Idaho, and was being treated for his back injured as aforesaid herein, the said defendant by and through its foreman and agent,

Nels Stromberg, required the plaintiff to do and carry on boilermaker helper's work; that while so engaged, the said plaintiff was negligently instructed by defendant's boilermaker, Harold Hartman, to mount a narrow ledge upon a steam locomotive that was being used in interstate commerce; that said ledge was very narrow and very high from the ground; that said plaintiff was required to tighten bolts on said locomotive; that while tightening said bolts, the said plaintiff seriously strained, wrenched and dislocated his back; that said defendant by and through its agents was negligent as follows:

1. In instructing the plaintiff to mount said narrow ledge and place him in a perilous position.

2. In requiring the plaintiff to do strenuous work where it was necessary for him to assume an awkward pose, thus causing a condition whereby plaintiff was injured as aforesaid.

3. In requiring the said plaintiff to do strenuous work in an awkward pose while the plaintiff was under treatment by defendant's Doctor.

4. Requiring plaintiff to do work for which the said plaintiff was not qualified.

5. Requiring plaintiff to do boilermaker helper's work.

VII.

The facts stated in Paragraph VI are hereby realleged as though the same were set out herein in full; that the said defendant failed to provide proper equipment for working on steam engines and failed to observe safety rules as follows:

1. Failing to provide equipment, whereby plaintiff would not be placed in a perilous position.

2. Instructing plaintiff to do work without proper equipment.

3. Failing to maintain proper safety standards by reason of which, plaintiff was injured.

4. In failing to make a report of the accident as required of the foreman, Nels Stromberg, by that certain rule book entitled, "Safety Rules for Employees, in the locomotive, car and store departments" printed and published by defendant and distributed to its employees.

5. In failing to provide proper medical attention to said plaintiff.

VIII.

That prior to said injury, the said plaintiff was a strong and able-bodied man, capable of and actually earning the sum of \$230.00 per month; that because of these injuries, the said plaintiff has been made incapable of any gainful activity since October 8, 1951, has suffered great physical and mental pain and has incurred expenses in the amount of \$250.00 for medicine and medical attention. That said plaintiff has been damaged in the sum of \$50,000.00 for pain, suffering and loss of employment and earnings.

Wherefore, plaintiff prays judgment against the defendant in the sum of \$50,250.00 and costs.

/s/ ROBERT V. GLASBY,
Attorney for Plaintiff

[Endorsed]: Filed January 15, 1953.

[Title of District Court and Cause.]

MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO STRIKE

Comes Now the defendant and moves against the plaintiff's complaint, as follows:

I.

To dismiss the complaint against the defendant because it does not state facts sufficient to constitute a cause of action or claim upon which relief can be granted.

II.

If the foregoing motion to dismiss be denied, the defendant moves the court that so much of paragraph I of plaintiff's complaint stating that said action arises under the act of Title 45, U.S.C.A., Secs. 1 to 23, be stricken, because and for the reason that there are no facts alleged in said complaint which would make the aforementioned sections applicable in this proceeding.

/s/ B. E. LUTTERMAN,
CHAS. F. HANSON,
MORELL E. SHARP,
/s/ ELDER & ELDER,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed February 27, 1953.

[Title of District Court and Cause.]

MINUTE ORDER

April 27, 1953

This cause came regularly on this date, in open Court, for hearing on defendants Motion to Dismiss and Strike. Robert Glasby appearing for the plaintiff and Robert H. Elder and Morell Sharp, appearing for the defendant.

After a general discussion between the Court and Counsel, the Court ordered the Motions submitted on brief, the defendant to have 10 days from this date to file his opening brief, the plaintiff the 10 days following to reply and the defendant 5 days following to reply to the reply brief.

[Title of District Court and Cause.]

ORDER

This matter is before the court upon the Defendant's Motion to Strike and Motion to Dismiss. Briefs have been submitted by respective counsel and the same duly considered by the Court. It is the opinion of the Court that the Motions should be denied, the Court reserving the right to rule upon the Motion to Strike at the time the same is heard upon its merits.

Now, Therefore, It Is Hereby Ordered that the

Motion to Dismiss, or in the Alternative, Motion to Strike be and the same hereby are Denied.

Dated October 6, 1953.

/s/ CHASE A. CLARK,
United States District Judge

[Endorsed]: Filed October 7, 1953.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant and answering the complaint of the plaintiff admits, denies and alleges as follows:

I.

Answering paragraph I, the defendant admits that the jurisdiction of this court is invoked under Title 45, U.S.C.A., Section 51 to 60, but denies the applicability of Title 45, U.S.C.A., Section 1 to 23.

II.

Answering paragraph II, the defendant admits that it is a Wisconsin corporation operating in interstate commerce with a railroad running through the City of St. Maries, County of Benewah, State of Idaho, but denies each and every other allegation therein contained.

III.

Answering paragraph III, the defendant admits the same.

IV.

Answering paragraph IV, the defendant denies each and every allegation therein contained.

V.

Answering paragraph V, the defendant denies each and every allegation therein contained.

VI.

Answering paragraph VI, the defendant admits that at the time and place alleged in plaintiff's complaint Nels Stromberg was foreman in and about said roundhouse and acted as said defendant's authorized agent in performance of his duties as foreman, but further answering said paragraph, the defendant denies each and every other allegation therein contained.

VII.

Answering paragraph VII, the defendant denies each and every allegation therein contained.

VIII.

Answering paragraph VIII, the defendant denies each and every allegation therein contained, and particularly denies that plaintiff was injured in the sum of \$230.00 per month, or in any sum or sums whatsoever for loss of earnings, or that plaintiff was damaged in the sum of \$250.00, or in any sum or sums whatsoever for medical attention, or that plaintiff has been damaged in the sum of \$50,000.00, or in any sum or sums whatsoever for pain and suffering and loss of earnings, as in said paragraph alleged,

or otherwise, or at all, on account of any act, omission or negligence of the defendant.

Affirmative Defense

Further answering said complaint, and for an Affirmative Defense, the defendant alleges that if the plaintiff was injured or damaged as in said complaint alleged, or otherwise, or at all, such injuries or damages were not caused by any act, omission or negligence of the defendant, but were proximately caused by the negligence and carelessness of the plaintiff himself, and particularly the defendant alleges that the plaintiff was guilty of contributory negligence.

Wherefore, having fully answered, the defendant prays that the above entitled action be dismissed with prejudice and that it do have and recover judgment against the plaintiff for its costs and disbursements.

B. E. LUTTERMAN,
CHAS. F. HANSON,
/s/ MORELL E. SHARP,
ELDER & ELDER,
/s/ By ROBT. ELDER,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed October 14, 1953.

[Title of District Court and Cause.]

MINUTE ORDER

October 26, 1953

This cause came on for trial before the Court and a jury, Robert W. Glasby appearing for the plaintiff, and Robert Elder for the defendant. Upon motion of Robert Elder, Morell Sharp was admitted as associate counsel for the defendant.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper, to secure a jury. Mrs. Bill Zanetti and Neil V. Cooper, whose names were so drawn, were excused for cause; Charles W. Lehti, Mrs. Ira A. Robson and Howard E. Elford, whose names were also drawn, were excused on the plaintiff's peremptory challenge; and Mildred Peterson, whose name was likewise drawn, was excused on the defendant's peremptory challenge.

Following are the names of the person whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified and who were accepted by the parties to complete the panel of the jury, to-wit:

James Orville Shields, L. R. Miesen, Jr., Clayton R. Smith, Elva B. Beach, James C. Ashton, Arthur F. Shields, Vera E. Garber, Jean E. Goldstein, Arthur L. Earin, Pete Hay, Edward Haugen, Arthur R. Klaudt.

The Court directed that one juror, in addition to

the panel, be called to sit as an alternate juror. Thereupon the name of Lilian Riep was drawn from the jury box, and on being sworn and examined on voir dire, was found duly qualified, and was accepted by counsel for the respective parties.

The jury panel and the alternate juror were sworn to well and truly try the cause at issue and a true verdict render.

After a statement of plaintiff's cause by his counsel, James A. Nitcy, H. Don Mosley, H. C. Hartman, Bernard M. Sorenson, Mrs. Leona Nitcy, Bergan A. Rapp, Thomas Moutray, Herbert Marquart and Robert E. Granville were sworn and examined as witnesses, and other evidence was introduced, on the part of the plaintiff.

After admonishing the jurors, the Court excused them to 10 o'clock a.m., Tuesday, October 27, 1953, and continued the trial to that time.

[Title of District Court and Cause.]

MINUTE ORDER

October 27, 1953

This cause came on for further trial before the Court and jury; counsel for the respective parties being present, it was agreed that the jury panel and the alternate juror were all present.

It was stipulated by and between counsel for respective parties that if Dr. Richard C. Miller was present he would testify that from review of the

plaintiff's record of September, 1949 there was no evidence of anything wrong with his spine at that time and that there was no charge for this information.

Here plaintiff rests.

Plaintiff having rested, comes now the defendant and renews his motion to strike and dismiss. The Court being advised, ordered paragraphs 5, 6 and 7, and 2 and 3 of paragraph 4 of the complaint stricken. The motion to dismiss was overruled without prejudice.

Harry Bogardis, Dr. F. E. Miller and Dr. James F. DaPree were sworn and examined as witnesses on the part of the defendant, and other evidence was introduced, and here defendant rests and both sides close.

Comes now the defendant and renews its motion to dismiss. The same ruling by the Court.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury.

The Court discharged the alternate juror, and the jury panel retired in charge of a bailiff, duly sworn, to consider of their verdict. While the jury was still out, the Marshal was directed to provide them with supper at the expense of the United States.

On the same day the jury returned into court, counsel for the respective parties being present, whereupon, the jury presented their written verdict, which was in the words following:

[Title of Court and Cause.]

Verdict

“We, the jury in the above entitled cause, find for the plaintiff, and against the defendant, and assess damages against the defendant in the sum of \$12,870.

Pete Hay, Foreman.”

The verdict was recorded in the presence of the jury and then read to them and they each confirmed the same.

Comes now the defendant and informs the Court that it intends to file a motion for judgment notwithstanding the verdict or in the alternative a motion for new trial, and a motion for a reduction in the verdict.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above entitled cause, find for the plaintiff, and against the defendant, and assess damages against the defendant in the sum of \$12,870.

/s/ PETE HAY, Foreman.

[Endorsed]: Filed October 27, 1953.

[Title of District Court and Cause.]

**MOTION FOR JUDGMENT IN ACCORDANCE
WITH MOTION FOR DIRECTED VER-
DICT OR FOR NEW TRIAL**

Comes now the defendant and moves the Court to set aside the verdict of the jury and to enter judgment in favor of the defendant in accordance with its motion for directed verdict because the plaintiff's evidence was insufficient in law, or if the foregoing motion be denied, to set aside the verdict and the judgment entered thereon and grant defendant a new trial for the following reasons:

1. The verdict is contrary to the clear weight of the evidence.

2. There is insufficient evidence upon which to support a verdict for the plaintiff.

3. The verdict and the excessive damages assessed show that the verdict was the result of sympathy, passion, and prejudice rather than upon the evidence introduced and the instructions of the court.

4. The trial was unfair generally to the moving party and resulted in a miscarriage of justice.

/s/ MORELL E. SHARP,
Attorney for Defendant
ELDER & ELDER,

/s/ By ROBT. ELDER,
Attorneys for Defendant

Acknowledgment of Service attached.
[Endorsed]: Filed October 29, 1953.

[Title of District Court and Cause.]

MINUTE ORDER

November 4, 1953

Defendant having requested a transcript before arguing their Motion, the Court thereupon ordered argument submitted on brief, defendant to have 30 days after receiving transcript to file opening brief, plaintiff 30 days following to answer and defendant 20 days to reply.

[Title of District Court and Cause.]

MINUTE ORDER

March 19, 1954

Upon motion of counsel for the defendant and there being no objection by the plaintiff, defendant was given up to and including April 1, 1954, in which to file its opening brief on motion for judgment in accordance with the motion for directed verdict or for a new trial.

[Title of District Court and Cause.]

PLAINTIFF'S MOTION TO STRIKE AND
BRIEF IN OPPOSITION TO DEFEND-
ANTS MOTION FOR DIRECTING VER-
DICT OR NEW TRIAL

Now comes plaintiff and moves the Court to strike defendant's motion for directed verdict or new trial on the grounds that said motion is in-

sufficient to be considered by the Court as this motion for directed verdict does not state the specific grounds upon which the defendant relies in accordance with Rule 50, Federal Rules of Civil Procedure; that the motion for new trial is insufficient in that it fails to specify the particulars wherein the evidence is considered to be insufficient in accordance with Rule 50 of "Rules of Practice of the United States District Court of the District of Idaho".

Plaintiff further moves that said defendant's motion be declared null and void ab initio and that the order staying execution be dissolved and that execution issue in pursuance to the judgment for plaintiff entered herein.

Argument in Support of Plaintiff's Motion To Strike

The conflict of authority on the Court's right to consider a general motion for a directed verdict pointed out in *New York Life Insurance Company vs. Doerhsen*, 75 Federal 2d 96, was settled by Rule 50, Federal Rules of Civil Procedure, *Virginia-Caroline Tie & Wood Company vs. Dunbar*, 106 Federal 2d, 383, See also, 2 *Barron & Holtzoff* 756 and 3 *West Federal Form* 631; *Atlantic Greyhound Corporation vs. McDonald*, 125 F2 849.

Defendant's motion in regard to new trial was supported by brief only as to Points 1 and 2. Points 3 and 4 were not urged.

Points 1 and 2 are practically the same thing and will fall within the provisions of Rule 50 of "Rules

of Practice of the United States District Court of the District of Idaho" which states:

"If a ground be insufficiency of the evidence, the petition shall specify the particular wherein the evidence is considered to be insufficient. If the petition does not contain the above mentioned specifications, the unspecified grounds will be disregarded."

It can not be seriously contended that defendant's brief can be considered a portion of the motion attacked in view of the prohibition of Rule 6 of Federal Rules of Civil Procedure requiring motions for directed verdict and new trial to be filed within ten days after judgment filed. Judgment in this instant case was the 27th day of October, 1953, Atlantic Greyhound Corp. vs. McDonald, *supra*.

Defendant's motion could not be helped by oral statement of any kind, made during the trial since the transcript reveals no oral statement specifying grounds upon which the motion for directed verdict is based. The defendant was the party ordering the transcript to be prepared, it can not now complain that arguments stating grounds, if any, were not incorporated in the record.

Alternative Argument

While plaintiff takes the position that the motion to strike defendant's motion should be sufficient to dispose of all matters and controversies, he feels that it is necessary to refute the merits, if any, of defendant's brief in support of defendant's motion.

Plaintiff feels that it is unfortunate that it is necessary to restate the facts of this case but in

view of the distortion of the facts placed in defendant's brief, it is necessary that the most glaring distortions be pointed out and refuted. While plaintiff contends that it is not necessary to complain prior to undertaking a task with hidden dangers, there is ample evidence of complaint when the danger was discovered. The evidence shows (tr. 8) that plaintiff cried out for help and that plaintiff said he had hurt his back on said barrel. See also Tr. 33. The uncontradicted evidence shows that Bogardis was supervising the work and that he nevertheless, ordered plaintiff to lift the barrel, (tr. 8).

Plaintiff's testimony was not contradicted as Bogardis stated he did not recall whether or not, he had been assisted by plaintiff in putting up the barrel of wash oil, (tr. 122-128).

There was ample evidence for the jury to find plaintiff was injured and that the railroad doctor, Doctor Rapp knew of the injury. Said Doctor's testimony shows that he treated plaintiff for an injured back on February 14, 1950.

Q. Do you know for what purpose the x-ray was taken?

A. Well, he saw me in February for this same matter, for the back pain. (Tr. 88)

Q. What did he say was the matter with his back?

A. That it just came on while he was working. (Tr. 92)

If the testimony of the railroad doctor, Doctor

Rapp, would be considered to attain the dignity of conflicting testimony, the jury has the right to decide what is correct.

Defendant had the audacity to state as a fact the contents of a self-serving note regarding a purported injury before the barrel episode. This note was definitely proven not to have been written by the plaintiff by plaintiff's uncontradicted testimony, (tr. 31).

The Vice-Principal, Harry Bogardis, was aware of the danger in lifting the barrel as he attempted to lift the same himself (tr. 6), nevertheless, he ordered the plaintiff to lift the barrel (tr. 8).

Points and Authorities

I.

Failure to warn of dangers known to supervisor constitutes negligence and a person acting under orders has a right to assume he is reasonably safe. *Meigs vs. Porter, et al.*, 126 Pac. 411.

II.

A man is not required to quit his job rather than to do something dangerous. *Blair vs. Baltimore & Ohio Railroad Co.*, 89 L.Ed. 490.

III.

An employee has the right to assume that he may act according to orders of the foreman and may rely on their advise. *Leonides vs. Great Northern Railroad Co.*, 72 Pac. 2d, 1007, 83 L.Ed. 3.

IV.

“When a thing which causes injury is shown to be under the exclusive control of the defendant and the injury is such as in the ordinary course of things does not occur, if the one having such control uses proper care, it affords reasonable evidence in the absence of an explanation, that the injury arose from the defendants want of care,” *San Juan Light and Transit vs. Requeaa*, 56 L.Ed. 680, cited with approval in *Jesionowski vs. Boston and Main Railroad*, 91 L.Ed. 416.

V.

It is incumbent upon the party against whom a jury has found a verdict to make a stronger showing to support a directed verdict in cases arising under Federal Employers Liability Act than in other negligence cases. *Urie vs. Thompson*, 93 L.Ed. 1282 11 ALR 2d 52.

Defendants brief is largely complaining about matters which the jury found to be facts which defendant claims were not supported. The defense that the Jury determined questions contrary to the instructions given by the Court is not open to the defendant in that they have not contended as a ground for their motion that the Jury determined questions contrary to the instructions. The doctrine in which the law is deeply steeped, is that the Judge will not disturb the verdict where the Jury has determined issues in favor of one party where reasonable men could have differed in determining the facts under the evidence. In this case the evidence

was overwhelming in favor of the plaintiff and against the defendant.

Respectfully submitted,

/s/ ROBERT V. GLASBY

Acknowledgment of Service attached.

[Endorsed]: Filed April 27, 1954.

[Title of District Court and Cause.]

MINUTE ORDER

May 14, 1954

This cause came on regularly this date in open court to be heard on motion for Judgment N.O.V. and motion for new trial, Robert W. Glasby appearing as counsel for plaintiff, and Morell G. Sharp appearing as counsel for the defendant.

After hearing counsel, the court granted the motion for a new trial and denied the motion for Judgment N.O.V., and set the cause for trial at 10 o'clock a.m., May 20, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To James A. Nitey, plaintiff, and Robert V. Glasby,
his attorney:

You and each of you will please take notice that the above named defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment made and entered in the above entitled court and cause on the 27th day of October, 1953 in favor of the plaintiff and against the defendant in the above entitled action; and from that certain order made and entered in the above entitled court and cause on the 14th day of May, 1954 in favor of the plaintiff and against the defendant, being an order denying defendant's motion for judgment in accordance with its motion for directed verdict.

Dated this 14th day of May, 1954.

CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD CO.,

/s/ By MORELL E. SHARP,
Its Attorney of Record

[Endorsed]: Filed May 14, 1954.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Whereas the defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, desires to give an undertaking on appeal to the Ninth Circuit Court of Appeals as provided in Rule 73 of the federal rules of civil procedure as set forth in the United States Code Annotated.

Now, Therefore, the undersigned surety, the Hartford Accident and Indemnity Co., a surety company authorized to act as surety on bonds and undertakings in the State of Idaho does hereby obligate itself to the said plaintiff under such statutory obligations in the amount of Two Hundred Fifty Dollars (\$250.00).

Dated this 14th day of May, 1954.

HARTFORD ACCIDENT AND IN- DEMNITY COMPANY

[Seal] /s/ By H. BENSON, Attorney-in-Fact
Agent at Coeur d'Alene, Idaho

[Endorsed]: Filed May 14, 1954.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, designates the following to be contained in the record on appeal in this action:

1. The complete record and all proceedings in said action, including the transcript of evidence.
2. Notice of Appeal.
3. Undertaking on Appeal.
4. This Designation of Contents of Record on Appeal.

Dated this 20th day of May, 1954.

B. E. LUTTERMAN,
CHAS. F. HANSON,
/s/ MORELL E. SHARP
ELDER & ELDER,
/s/ ROBT. ELDER,
Attorneys for Defendant

[Endorsed]: Filed May 25, 1954.

[Title of District Court and Cause.]

ORDER

Upon the motion of the plaintiff for leave to appeal in forma pauperis without prepayment of fees and costs.

It is ordered that the motion be granted and the plaintiff may take and prosecute his appeal, without prepayment of fees and costs or the costs of a stenographic transcript or printing any part of the record, the expense of which is to be paid by the United States when authorized by the Court.

Dated this . . . day of June, 1954.

/s/ CHASE A. CLARK,
United States District Judge

It is hereby certified that the appeal on the part of the Plaintiff is not frivolous.

/s/ CHASE A. CLARK,
United States District Judge

[Endorsed]: Filed June 17, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and Elder & Elder, its attorney:

You and each of you is hereby given notice that James A. Nitecy, Plaintiff above named, hereby cross-appeals to the United States Court of Appeals for the Ninth Circuit from the order granting a new trial and from orders during the progress of the trial withdrawing counts in the complaint from the consideration of the Jury; said order granting new trial was entered on May 14, 1954.

Dated this 11th day of June, 1954.

JAMES A. NITCY
/s/ By ROBT. V. GLASBY

[Endorsed]: Filed June 11, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP) to wit:

1. Complaint.
2. Summons with Return attached.
3. Motion to Dismiss, or in the alternative, Motion to Strike.
4. Minutes of the Court of April 27, 1953.
5. Motion for Enlargement of Time to file Brief.
6. Order on Ex Parte Application Enlarging Time.
7. Order Denying Motion to Dismiss, etc.
8. Answer.
9. Demand for Trial by Jury.
10. Minutes of the Court of Oct. 26, 1953.
11. Verdict.
12. Minutes of the Court of October 27, 1953.
13. Judgment.
14. Motion for Judgment in Accordance with Motion for Directed Verdict or for New Trial.
15. Notice of Taxation of Costs.
16. Minutes of the Court of Nov. 4, 1953.
17. Motion for Stay of Proceedings, etc.

18. Affidavit of Service.
19. Order Granting Stay of Proceedings, etc.
20. Minutes of the Court of March 19, 1954.
21. Plaintiff's Motion to Strike and Brief.
22. Minutes of the Court of May 14, 1954.
23. Order Granting Motion for New Trial, etc.
24. Notice of Appeal by defendant.
25. Undertaking on Appeal.
26. Designation of Contents of Record on Appeal.
27. Motion of Plaintiff to Proceed in Forma Pauperis.
28. Affidavit of plaintiff.
29. Order to appeal in Forma Pauperis.
30. Notice of appeal by plaintiff.
31. Order Extending Time for Appeal.
32. Transcript of Testimony.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court, this 6th day of July, 1954.

[Seal]

/s/ ED. M. SMITH,
Clerk

In the United States District Court for the District
of Idaho, Northern Division

No. 1914

JAMES A. NITCY, Plaintiff,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS

This cause was tried before the Honorable Chase A. Clark, United States District Judge, sitting with a jury, at Coeur d'Alene, Idaho, on Oct. 26, 1954.

Appearances: Robert W. Glasby, Coeur d'Alene, Idaho, Attorney for the Plaintiff. B. E. Lutterman, Esq., Seattle, Wash., Charles F. Hanson, Esq., Seattle, Wash., Morell E. Sharp, Esq., Seattle, Wash., Robert Elder, Esq., Coeur d'Alene, Idaho, Attorneys for the Defendant.

G. C. Vaughan, Reporter. [1*]

JAMES A. NITCY

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Glasby): Where do you reside, Mr. Nitcy?
A. St. Maries, Idaho.

* Page numbering appearing at bottom of page of original Reporter's Transcript of Record.

(Testimony of James A. Nitcy.)

Q. What are you doing now?

A. Nothing at all.

Q. Have you,—what have you done in the past?

A. You mean all of my life?

Q. Well, let us say for the past four or five or ten years?

A. I have worked for wages.

Q. What type of work have you done?

A. Labor.

Q. Have you ever done anything but labor in the line of work? A. No, sir.

Q. In your life you have done nothing but labor work? A. That is all.

Q. How much education did you have?

A. Not very much.

Q. Well, how far did you go in school?

A. Probably to the fourth grade.

Q. Have you done quite a bit of reading on your own?

A. No, I haven't, I haven't had time to do that.

Q. You are not a self educated man, are you?

A. No, sir.

Q. When did you go to work for the railroad company, that is, when you were working during the time of these injuries that you have complained about?

A. Well, that was in 1949, the last time that I went to work for them.

Q. Do you know what month that was?

A. I had a record of it but I can't remember.

Q. Was it in the fall, do you know about that?

(Testimony of James A. Nitcy.)

A. Yes, sir.

Q. And you worked for the railroad on what type of work, what were you classified to do there?

A. I was classified as a laborer.

Q. Were there other classifications there, people working in other capacities?

A. Yes, sir, lots of them.

Q. Well, can you give the background of some of those different capacities, name the different types of classifications?

A. There were laborers, firemen, stationary firemen, machinists and machinists helpers, boiler-makers and boilermaker's helpers, and, of course, there was the boss.

Q. Did these machinists who had helpers and the boilermakers who had helpers, did they have the helpers always with them?

A. Yes, they did, until the boilermaker's helper quit.

Q. So far as you know they never worked without a helper? [2] A. No.

Q. Did you ever do any of that work?

A. Yes, they used me to do that work, too.

Q. As a boilermaker's helper or as a machinist's helper? A. Both.

Q. And did you and the other laborers there have to do this work occasionally?

A. I don't know about the other laborers, but I did occasionally.

Q. Calling your attention to February of 1950

(Testimony of James A. Nitcy.)

was there an incident that occurred in that month that stands out in your mind?

A. Well, I hurt my back lifting a barrel.

Q. Will you explain in detail about this barrel incident, if you please. First I will ask you how far was the barrel to be moved?

A. Well, it would be from where it was outside the roundhouse about fifty yards into the roundhouse.

Q. What were you going to do with the barrel when you got it in?

A. Well, we had to put it up to the washer.

Q. What do you mean?

A. Well, we had to put it up on a stand.

Q. How high was that?

A. I would say about two feet. [3]

Q. And were you pulling this in yourself, were you bringing that in yourself?

A. We only had thirty minutes for dinner, of course we got paid for that hour and——

Q. ——What date was this, Mr. Nitcy?

A. This was the 10th of February.

Q. 1950? A. Yes, 1950.

Q. And you were pulling this barrel in during the dinner hour, is that what I understand?

A. Yes, sir.

Q. Who was at the roundhouse then?

A. Just me and Harry Bogardis, that is the fellow I was helping.

Q. You say you were helping Harry Bogardis, what position did he occupy there?

(Testimony of James A. Nitcy.)

A. He was over me, that is, he was a stationary fireman.

Q. Did you work for him on this day?

A. I did.

Q. On this particular job of moving this barrel, —that was in his charge, was it? A. Yes.

Q. Just how did you move this barrel, will you explain that?

A. Well, we had to put this barrel up to wash this engine that was set out there and as soon as we ate dinner we or rather he got this old two wheeled truck. It was [4] a big wooden truck with iron wheels.

Q. Two wheels on the truck, was there?

A. Yes.

Q. Is that sometimes called a dolly?

A. Well, I don't know, I call it a two-wheeled truck.

Q. He chose that tool, did he? A. Yes.

Mr. Sharp: We will object to that as leading, if the Court please.

The Court: Yes, it is leading, you will have to let the witness do the testifying.

Q. Who chose that?

A. He went and got the old cart, yes, he is the one that did that. Of course, it was right there where we would go out the door and there was always a rope with a hook on it that we pulled stuff around there with. I believe it was about four or five feet long and I took that and went out on the platform, the barrel was sitting on end, just

(Testimony of James A. Nitcy.)

sitting on end on this big platform, and we tipped the barrel a little and run the nose of the truck under it and then we tipped it back over on the truck and I hooked the rope on and away we went. When we got it in the roundhouse we were both kind of tired, you know, it was a kind of a hard pull up there, it was a little rough and the hard pull up to where the stand was where the barrel went. There was [5] quite a big place there, I would say eight or ten feet across where the engine's blow-cock blowed the steam out and blowed water and stuff out there and it made a big hole and that was filled with sand and right there is where it was to set, and so he just wheeled up to that and dumped the barrel off. He was out of breath and so was I and so we just stood there a few minutes and rested and he was kind of vexing about having to do that kind of work because the younger men would not put this barrel up there, and he tried to lift the barrel up and didn't make it, it was down on the side in this sand.

Q. Did he try to lift this barrel up and put it on that platform?

A. Oh, no, he was trying to lift it up on its end, it was down on the side there and it had to be lifted on its end to put it on this platform. We had to get it on its end so that the platform could kind of be tipped and shoved under and we would tip the barrel over on it.

Q. Will you just explain to the jury what this platform was like?

(Testimony of James A. Nitcy.)

A. Yes, it was just like a sled about two feet high and just the length of the barrel. It was kind of an iron frame and it had two shoes on it about like that, that size (indicating) and it had a little nose about that long that you tipped it up just kind of like on a rocker and when you tipped up like that (indicating) that nose [6] would be right down on the ground and if you tipped the barrel up, oh, it wouldn't need to be very far, just about that far (indicating) and then you could run this nose right under the barrel and then you could tip the barrel up. The barrel would be standing straight up about that time and then you could tip the barrel and all right up with these rockers and you could just jerk it to where you wanted it.

Q. You had done that a number of times, had you?

A. Well, yes, I had, that is, I had helped with it.

Q. Could the barrel be put on this platform from a horizontal position on the ground?

A. What do you mean by horizontal, I don't understand.

Q. I mean laying down on the side in that sand.

A. The only way it could be done was if two men were strong enough to lift it right straight up, to lift a fifty gallon barrel full straight up I know I couldn't do it, and there was nobody around there that could, that is why they have these rockers, these rocker shoes, so that it could just be

(Testimony of James A. Nitey.)

set on end and tipped a little and then rocked right over.

Q. And the barrel had to be upright to do that?

A. Yes, and it wasn't at that time. That is where I hurt my back, lifting this barrel up on end in this sand. The sand was piled up there when the barrel cut in on its end and [7] I couldn't raise it up.

Q. When you raised it could you get away from it?

A. No, my feet was down in that sand, I had it up as high as I could and I said to Mr. Bogardis, "Help me". I couldn't get away or anything else, I was just stuck there, I had all of the load on myself there.

Q. How big a load was this?

A. It was a fifty gallon full barrel, a new barrel not opened.

Q. Did you say anything about your back being injured at that time?

A. Well, I had told Harry that I had hurt my back,—Harry Bogardis.

Q. What did you do after that?

A. Well, we finally got the barrel up and went around about our business there and when I finally say Nels,—

Q. Who was Nels?

A. —Mr. Stranberg, I told him, but he went on, he never said anything, he was a little hard of

(Testimony of James A. Nitcy.)

hearing and he didn't say anything about it, just went on.

Q. He didn't give you any instructions at that time? A. No.

Q. Who was supervising this job of lifting the barrel?

A. Well, Bogardis was, he was the one that told me that we had to put it up there to wash this engine, you can't wash [8] the grease off an engine with water, you have to have cutting oil and that was cutting oil in the barrel, you have that mixed in with steam and water.

Q. He was supervising this job of getting the barrel up, was he? A. Yes, sir.

Q. And he was present at that time, was he?

A. Certainly. He finally reached over and got hold of the top of the barrel and helped me to get it on over and put it up.

Q. When did he do that?

A. That was after I got stuck with it and said "Help me".

Q. He didn't make any effort to help you before that?

A. Only he took hold and tried to lift it himself and he couldn't do it.

Q. Could you both get on the end of that barrel and try to lift it?

A. Well, I was on one side there and on the end and I tried to lift it up. I had one hand about like this and I got it up about that high and he

(Testimony of James A. Nitey.)

reached over and got ahold of a flange, a flange about that wide (indicating).

Q. And he helped raise it up then?

A. Yes, sir.

Q. He didn't make any effort to help you with that until you complained? [9]

The Court: I know that counsel dislikes to object continually but I can see that he is getting nervous about these leading questions, so I will tell you, Mr. Glasby, you will have to let the witness testify and you can conduct this examination without so many leading questions, and now go ahead.

A. Well, that is the way it was, I could never have got the barrel up and if I had fell down the barrel would have fell on top of me, I just couldn't get away.

Q. As a laborer around there, prior to February what kind of work had you done around this roundhouse, did you do hard or light work?

A. I did everything that was to be done, light work and hard work, anything that needed to be done.

Q. Did you continue with the same type of work all the time that you were working at this roundhouse?

A. Well, yes, I was still a laborer and I did all that I could and I got hurt, and there was some lifting that I couldn't do.

Q. What was that that you couldn't do?

A. Well, lifting heavy things, I couldn't do

(Testimony of James A. Nitcy.)

that, like lifting barrels and stuff like that, and, of course, like shoveling coal I had to stop that completely.

Q. You had been shoveling coal before that time?

A. Yes, I shoveled coal in the daytime when I was firing. [10]

Q. When did you quit shoveling coal?

A. Well, I don't remember, I know I have got the date. I know I was called back east on a trip and when I came back I asked Mr. Stranberg if I could quit shoveling coal that it was too hard on my back, I said I just can't do it, and I said if you want to put another man in my place that is all right but I just can't shovel coal, and he said "Well——

Mr. Elder: I don't believe this man could testify as to what some other man said, we will object to that.

The Court: There is quite a question here as to whether anybody can be forced to do anything that they don't want to do,—I believe I will let him go ahead.

Q. How long did you work after February of 1950?

A. After February of 1950 I worked until,—well, it was in 1951, I can't remember just the date, I have it there but I can't remember it now.

Q. Between February of 1950 and the time that you quit in 1951 is there any event that stands out in your mind?

A. Yes.

(Testimony of James A. Nitcy.)

Q. What was it?

A. Well, the boilermaker asked me to help him, that was on the 13th of October, 1950, he asked me to help him clean the front end of an engine. I was ordered by Mr. Stranberg [11] to always help the boilermaker or whoever asked me around there to help him, that is to help anybody that was over me and they was all over me, and so I goes and helps him on the engine and we clean out all the sand and soot out of the front end of the engine and then, of course, we had to close up the front end which is closed up with a bunch of big burrs all around the engine door. I said to him when I shut the door,—it is on a hinge on one side and I shut the door and was going to tighten the clamp and I said to Mr. Hartman, he was the boilermaker, when I looked up there I couldn't see no place to get, I couldn't see no place to stand.

Q. Had you ever worked on these engine before?

A. I had helped to clean them out but I never tightened them up before but the Malleys, that is the big freight engine and this was just a small engine. The big Malleys have a platform that you can stand there and tighten up the bolts and burrs to close this door, but this one, this small engine there is nothing there but the headlight in the middle, right in the middle of this door and there are some little prongs running back from this headlight,—that is right in the middle of the door and it swings open with the door. I said to Mr.

(Testimony of James A. Nitcy.)

Hartman, the boilermaker, "Where am I to stand"?, and he said, [12] "Up on that headlight". When I get ready to get up there, when I tightened the bottom one and when I get up there and start to tighten the other, I tightened some of them and just snug them up, but my instructions from the boss, Mr. Stranberg, was to really get them tight so that any big puff would not come out there or blow any sand out in any way. So after I got them snugged down I had to go over them the second time and I got on the one that was just up there above the lamp where I was standing on this kind of a ledge or a little piece of iron that was out there. I was kind of afraid of this old open end wrench, it was an old beat up wrench, and I was afraid that it would slip and that I would go right on over on my head down on the ground. I stood there and run my hand up along the boiler to get the right length,—I was in a twisted position there. I had to keep my feet in one position there and reach right down between my feet to get hold of this big wrench and when I did I figured I would just give one hard jerk and I did that,—I gave one jerk and my back came around but the bolt didn't and that is when I hurt my spine the second time.

Q. What did you do immediately after that?

A. Well, I got down after I got my breath and then I went and checked out and went home and I washed up.

(Testimony of James A. Nitcy.)

Q. Did you report the injury when you checked out? [13]

A. I reported it to Harold Hartman when I went out, I was bent over and my arms were as long as my legs, I couldn't get straightened up, I kinked my back or something and I just had to get home and get something done or get somewhere to have something done.

Q. Who were you supposed to report that injury to?

A. Well, I don't exactly know who I was supposed to report it to but I guess to the boss, or to the man that was over me so far as that goes.

Q. And who was that?

A. Harold Hartman and Mr. Stranberg.

Q. Did you report this to Mr. Stranberg?

A. Yes, sir.

Q. That day? A. Yes, sir.

Q. What time that day?

A. Well, at about four o'clock in the afternoon.

Q. When were you injured that day?

A. About ten minutes to eleven.

Q. Did you work between the time you were injured and four o'clock when you reported it to Mr. Stranberg?

A. No, I checked out about eleven o'clock and I went home and got cleaned up and then I went up town to a chiropractor by the name of Miller to see if I could not get something done to help me.

Q. Was there any reason that you didn't report to Mr. [14] Stranberg before you went home?

(Testimony of James A. Nitcy.)

A. Well, the only reason was that I went over there to do it and the office was locked up and I couldn't report it to him and I came back about four o'clock and told him about it.

Q. Do you know, did he report that to anybody else?

A. Yes, I know that he didn't report it.

Q. How do you know that?

A. He told me so.

Q. When?

A. Well, I got the dates of that somewhere, I went to Mr. Stranberg and got a blue slip to go to Dr. Raff.

Q. When was that?

A. Well, that was sometime,—I have it there somewhere, the exact date.

Q. Approximately when was it?

A. Well, I can't just exactly say.

Q. Was it right away after this injury in October or was it quite sometime after that?

A. It was quite sometime after that.

Q. About how long?

A. To get this slip to go up to see Dr. Dupree or Dr. Peacock, when he told me,—I guess, Mr. Glasby, I don't understand the question.

Q. You said, I believe, that you found out that this injury [15] had not been reported. Now when was the time that you found that out, that is what I want to know?

A. That was a long time after, that was a long

(Testimony of James A. Nitcy.)

time after I got hurt, I have the record of it right there.

Q. What was said, what was that conversation with Mr. Stranberg?

A. Well, I went there for the purpose of getting a blue slip so that it would not cost me anything to go to Dr. Raff, because he had to send me to another doctor and that was my idea to get to go to Dr. Raff to have him send me to another doctor. I had asked him twice about sending me somewhere because we were getting nowhere with my spine and he kept telling me that he couldn't send me nowhere and then, in the roundhouse there we found a sheet of paper there with the names of different doctors that you could pick out to go to and I picked Dr. Peacock. Someone on the railroad there, I don't know who it was now, told me that he had to send me to one of those doctors if I would choose one and I picked Dr. Peacock and that is when Mr. Stranberg told me he hadn't reported it, that is when I got this blue slip from him.

Q. The bailiff has handed you a document, what is that?

A. Well, this is a safety rule that they made us work under.

Q. That is one rule? [16]

A. No, this is lots of rules.

Q. Who issued that to you?

A. Mr. Stranberg.

Q. When you went to work there?

(Testimony of James A. Nitcy.)

A. Yes, sir.

Q. Does that book say anything about reporting injuries?

A. I don't think that it does very much.

Q. Just see what it does say, Mr. Nitcy?

The Court: The book itself is the best evidence.

A. Well, I can't read very good, someone else will have to read it.

Mr. Glasby: I am going to offer this in evidence.

Mr. Sharp: We didn't know of this rule book, I would like to take a little time to examine it.

The Court: Very well, you may do that. Now, do you have any objection?

Mr. Sharp: None, your Honor.

The Court: It may be admitted.

Mr. Glasby: I would like to have Rule 1 in that book shown to the jury.

The Court: You may read it to the jury.

Mr. Glasby: "Rule No. 1. Report of [17] injury, no matter how trivial, shall be made at once."

Q. Did anybody at the Milwaukee roundhouse ever complain about your work before February of 1950? A. No, sir.

Q. Have you ever been complimented on your work before that time?

A. Well, Mr. Stranberg used to have a by word always when he wanted me to do any work I would just start right out and he would always say "where is the fire", I was gone right away to do it, I didn't have to be told again and he compli-

(Testimony of James A. Nitey.)

mented me on that, that I was always gone to do the work when he mentioned it.

Q. Did he complain that you were not doing your work properly before February of 1950?

A. No, sir, he did not.

Q. Did you know Mr. Stranberg before you went to work in the Fall of 1949?

A. Yes, sir, I hired out for Mr. Stranberg in 1936, that is when I first got acquainted with him.

Q. Did you mean 1936?

A. No, in '46. I should have said in 1946.

Q. How long did you work at that time?

A. I forget the exact months, but it was six or eight, something like that, it may be a little longer than that I would say.

Q. Did Mr. Stranberg hire you in the Fall of 1949?

A. Yes, sir. [18]

Q. Now, Mr. Nitey, did you take any doctor's treatments for these injuries?

A. Yes, I did.

Q. Who mostly treated you?

A. Dr. Raff.

Q. Do you know whether he was working for the Milwaukee Railroad?

A. He was supposed to be a Milwaukee doctor, that is the way I understood it, that is what I was told.

Q. Where did he reside?

A. St. Maries, Idaho.

Q. What treatment did he give you?

A. He gave me shots in my left hip and also heat treatments.

(Testimony of James A. Nitcy.)

Q. Do you recall any other type of treatment that he gave you?

A. Yes, he gave me some pills for the pain once and he gave me some sleeping pills,—that is what he said it was for, I couldn't sleep at night.

Q. Were you ever doctored by any other railroad doctor besides Dr. Raff? A. Yes, I was.

Q. Who? A. Dr. Dupree.

Q. Where is Dr. Dupree located? [19]

A. Seattle, Washington.

Q. He was working for the Milwaukee Railroad, was he?

A. He was supposed to be the head surgeon, that is the way I understood it anyway.

Q. There was no other Railroad doctor who doctored you other than Dr. Dupree and Dr. Raff, is that right?

A. Well, I went for examination to Dr. Peacock once. He was a railroad doctor,—I am not sure, I don't know whether he was a railroad doctor but I do know that he was on the list and Dr. Raff sent me to him, I guess that was at my request.

Q. When did you doctor with Dr. Dupree in Seattle?

A. I got Dr. Raff to send me, that was the fifth of February, 1952, that is when my appointment called for.

Q. You have been handed a package, do you recognize that package? A. I do.

Q. Is there any printing on that package?

(Testimony of James A. Nitey.)

A. Yes, the printing that my wife wrote on there.

Q. What does that say, do you know?

A. Yes, it says Salehexin, that is the way I pronounce it. It is spelled S-a-l-e-h-e-x-i-n, and it says three a day.

Q. Is there any other writing on there?

A. Yes, there is a Milwaukee sign on here.

Q. Is there anything in that package?

A. Yes, sir. [20]

Q. What is in there? A. One tablet.

Q. Who gave you that package,—let me ask, was that given to you by anyone?

A. Yes, Dr. Dupree gave it to me.

Q. Was there anything in that package besides that tablet?

A. There was a hundred tablets in the package.

Q. Was there any directions on there as to what you were to do with those tablets?

A. Not only the ones my wife wrote on there, as I told her.

Q. Did Dr. Dupree give you any directions?

A. As I remember he said three a day and that is what I told my wife and she wrote it on there.

Q. Were you treated by Dr. Dupree while you were in Seattle? A. Yes, sir.

Mr. Glasby: I will offer that package in evidence.

Mr. Sharp: I cannot see what the purpose of this is, I cannot see that it is serving any purpose.

(Testimony of James A. Nitcy.)

I am wondering if he is trying to say that he was examined and this is what the doctor gave him just this slip of paper with three a day on it. If he is going to try to use this to show what the doctor did he can call the doctor or surely he can have something more than this. [21]

The Court: Well, I am sure that I don't know any more about it than you do at this time, Mr. Sharp.

Mr. Glasby: The purpose of this exhibit is to show that Mr. Nitcy was treated by Dr. Dupree rather than just examined by him.

The Court: As I recall, there is nothing before the Court now. This was simply offered and I think you made some statement.

Mr. Sharp: Well, I object to this as I think it is not material, it is not relevant and is not serving the purpose for which counsel says it is introduced, if it is to show that the doctor, Dr. Dupree, treated this man rather than just examined him all it has on here is his wife's handwriting saying three a day.

The Court: I don't believe that it makes any difference here. It is immaterial, I am quite sure of that, but I believe I will admit it because it doesn't make any difference.

Mr. Glasby: I have no further direct examination at this time. However, I would like to recall this witness at a later stage in the proceedings.

The Court: If your doctor is here [22] now, I dislike to keep them waiting, I will permit you

(Testimony of James A. Nitey.)

to put the doctor on the stand and get through with him so he would not need to wait around.

Mr. Glasby: The doctor has not arrived yet.

The Court: Very well, you may go ahead with your cross examination.

Mr. Sharp: If the Court please, counsel has requested that he be permitted to recall this witness later and I am wondering if that would be on his direct case.

The Court: Well, if that is the case, he should finish before you cross examine. If this witness is going to be recalled I will permit you to postpone your cross examination until all of the direct examination is completed.

Mr. Glasby: I will withdraw my request at this time to recall him.

The Court: Then you may proceed with your cross examination.

Mr. Glasby: Of course, I would have the right to call this man on rebuttal if it becomes necessary.

The Court: That is right, you have that right to call him on rebuttal. [23]

Cross Examination

Q. (By Mr. Sharp): I think that you testified that you worked most of your life as a laborer?

A. That is right.

Q. Will you recall for the jury some of the various jobs that you have had throughout your life, you have stated that you were and are a laborer, just tell us about that, please?

(Testimony of James A. Nitcy.)

A. I worked as a laborer always on the railroad. I also worked as a laborer on a ranch or a fire, I was also a laborer in a match mill in Minnesota. I have worked as a laborer all of my life, I worked as a laborer on the W.P.A. four years. I never had education enough to do anything else, I never had education enough to follow a trade and didn't,—

Q. —I only wanted the names of the type of work that you did and where you worked, I believe that you said that you worked in a match factory, is that right? A. Yes, sir.

Q. What kind of work was that?

A. That was carrying ribbons as a laborer.

Q. What do you mean by ribbons, you say you carried ribbons?

A. Yes, I carried them off the lathe, they made eight foot ribbons the width of a match box and they were creased to be folded and when they were folded they were in the [24] shape of a match box.

Q. Was that heavy work? A. Yes.

Q. How much did they weigh?

A. Well, you could carry as much as you could, as much as you had to carry to keep up with five lathes with two men, you carried them off and put them in a machine and chopped them, you kept those large tables empty for the men.

Q. And you say you worked on a ranch?

A. Yes.

Q. Were you ever engaged in breaking horses?

A. No, sir.

(Testimony of James A. Nitey.)

Q. Were you ever thrown from a horse?

A. Well, I was and I wasn't, the horse fell with me and left me on the ground and I naturally say that I was thrown or I wasn't, you can take it either way.

Q. What injuries did you receive, if any?

A. I received a broken leg, he fell on this leg (indicating) and broke it.

Q. Did you ever tell any of your doctors, say Dr. Dupree, that you had hurt your back while you were breaking horses?

A. No, sir, I did not.

Q. Did you ever tell any of your fellow employees at the [25] St. Maries Roundhouse that you had received such an injury?

A. Not that I remember of, no.

Q. You say that you don't remember, if you had told them that you would remember, would you not, you wouldn't just make up stories like that, would you?

Mr. Glasby: I don't believe that there is any proper foundation laid for that question.

A. I never told anybody, I never did break horses for anybody.

Mr. Sharp: I believe that I am laying the foundation.

The Court: Very well, you go ahead and lay the foundation.

Q. What was that last answer?

A. I never broke horses for anybody, do you mean broke them to ride, is that what you mean?

(Testimony of James A. Nitcy.)

Q. Yes, on a ranch, did you ever gentle any horses, horses that had never been broken, did you ever do any of that work?

A. What do you mean by breaking them, there is forty different ways to break horses. You can take a gentle horse and still break him to lay down or to stand on his hind feet or to make him into a rope horse, what [26] do you mean, just explain your question and I will answer it for you.

Q. Did you work with horses at all on the ranch?

A. Yes, I have, I have rode gentle horses a lot.

Q. And have you ridden horses that were never broken?

A. No, sir.

Q. They were always broken before you rode them?

A. They were always gentle horses when I rode them, yes.

Q. And other than the one fall that you say you had when you broke your leg, is that the only accident and injury?

A. That was a gentle horse, he just fell, his feet went from under him, he got scared of the saddle blanket, it was raining and we were out there in this gumbo, he was a very gentle horse.

Q. Did you ever tell Dr. Dupree that you had hurt your back while you were breaking horses?

A. No, sir, I never did.

Q. Did you ever tell the employees in the St. Maries Roundhouse that you had hurt your back?

A. No, sir.

(Testimony of James A. Nitcy.)

Q. The St. Maries Lumber Company, did you ever work for them? A. Yes, I did.

Q. And what period was that?

A. I think that was in 1946 or 1947, I don't remember the [27] dates but I do have a record of that, I have my slips from that company, as far as remembering the dates I can't do that. My wife took care of the records for me.

Q. Was this between the two periods that you worked for the railroad, did you work for the Lumber Company between the two periods that you worked for the railroad?

A. I worked for the railroad years ago.

Q. You testified, I believe, in answer to Mr. Glasby's question, that you worked for the railroad in 1946 and 1947, and that you returned again in the fall of 1949. Now, during that time did you work for the St. Maries Lumber Company?

A. I think I did, yes.

Q. Now, when you returned to the Milwaukee in the fall of 1949, did you tell any of your fellow employees that you had to quit the lumber company because the work was too hard on your back?

A. No, sir, I got laid off at the lumber company.

Q. Will you please listen to my question and then answer. Did you tell any of your fellow employees when you returned to the Milwaukee that the reason you quit the St. Maries Lumber Company was that the work was too hard on your back?

A. No, sir. [28]

Mr. Glasby: If he is going to ask for these con-

(Testimony of James A. Nitcy.)

versations I think he should first ask who he talked to and the foundation should be laid.

The Court: He has answered the question and I will let the answer stand.

Q. Prior to this alleged injury that you had in February of 1950, had you been treating with a chiropractor for a back injury or ailment?

A. Not for a back injury, I had sore muscles maybe from shoveling coal or some other work that I had done, sore arm muscles or something, I went there then, and I have went there for colds and other different things.

Q. But you say you didn't go to chiropractors for any back injury? A. No, none.

Q. Who were some of those chiropractors that you were going to in St. Maries or in that area?

A. Well, there was only one in St. Maries, Dr. Miller.

Q. In Lewiston?

A. I went to Lewiston, I believe, once but it wasn't for my back.

Q. And you went to one chiropractor in the St. Maries area but it wasn't for your back, is that right? A. That is right.

Q. Did you tell Dr. Roff that you had been going to [29] chiropractors for years for your back? A. I did not.

Q. Did you tell Dr. Dupree that?

A. No, sir.

Q. Prior to February, 1950, had you had any back trouble? A. No.

(Testimony of James A. Nitcy.)

Q. No trouble at all with your back?

A. I was always able to work, my back never bothered me only as I say sometimes I would get sore in the muscles, I would sore up some of my muscles. When I worked at the match factory that was hard carrying work, I would do that for eight hours and my muscles would get so hard that I would have to get them loosened up. Maybe I would have my wife rub them or maybe sometimes I would go to a chiropractor, I don't remember all of that.

Q. Where were those muscles that would get sore like you say, were they in the back?

A. No, in my arms and my shoulders.

Q. Then you never missed any work for the railroad because of any back injury, or for any one else, that is, you didn't miss any work on the railroad or any other place because of a back injury? A. Not that I remember, no.

Q. Wouldn't you remember it if you had any back trouble that caused you to stay away from work. If you can tell [30] me about what date it was.

A. No, I never remember any, I never had any trouble with my spine.

Q. Let's take 1947, did you ever stay away from work because of any injury to your back?

A. No, I never did.

Q. Will you look at this Exhibit No. 3, will you please tell me if that is your signature. Can you identify that as your signature?

(Testimony of James A. Nitcy.)

A. No, sir, that is not my signature. I will write my signature right below that and let everybody in the courtroom see it, I am a very poor writer, no, that is not my signature, that is not my writing, I never wrote that.

Mr. Sharp: I would like to offer this in evidence and if it is accepted in evidence I would like to read it to the jury at a later time, we can further identify it on plaintiff's case and we can clarify the matter of signature.

The Court: It may be admitted.

Q. Let me ask you again, do you deny that this is your signature? A. Yes, sir.

Q. Would it be your wife's?

A. It looks like her writing, she will have to decide that though. [31]

Q. Do you remember the incident that this relates to?

A. I remember that I sent word to him but I didn't know it was that way.

Mr. Sharp: I will read it, it is dated February 1st, 1947. It says, "Mr. Nels Stranberg: I hurt my back cranking the truck last night so I cannot come to work tonight, signed James Nitcy".

Q. Did you go to Dr. Miller in 1947 for a back injury or a back ailment?

A. Where, there are two Dr. Millers that I know.

Q. You testified, I believe, on direct examination that Dr. Miller in the St. Maries area treated you? A. In St. Maries, yes.

(Testimony of James A. Nitey.)

Q. Did you go to him in 1947 for a back ailment?

A. Not my back, I went for sore muscles. When I was working my arms and something like that would get sore in the muscles, but so far as my back was concerned I was able to work and lift and do things like that anywhere.

Q. You mentioned that there was another Dr. Miller, who is the other Dr. Miller?

A. He is a medical doctor in Spokane, I know him too, so when you say Dr. Miller I would like to know what doctor you mean.

Q. Yes, I will watch that. You testified on your direct examination that you did all kinds of jobs around that [32] roundhouse there, was that your assignment to help other people?

A. The way that was, and the only way that I can explain it. I was assigned up as a laborer on the Milwaukee, that was all that I was qualified to do, was just labor. Mr. Stranberg's code or orders was to help everybody to do everything that had to be done around there and that is just exactly what I did.

Q. Prior to February of 1950, did you ever complain about this work, did you ever complain to Mr. Stranberg or to anybody that you had too much work to do or that it was too hard on you or anything of that kind?

A. Well, I told him that the other fellows were laying off on the work there, here was the thing of it, the shift before me, whatever they left of

(Testimony of James A. Nitcy.)

their work I had to do, at times, I had to do their work and my work too and for that reason I could have complained and I probably did.

Q. You say that you probably complained?

A. Yes, sir.

Q. Prior to February of 1950?

A' Yes, sir.

Q. You complained that you had too much work to do, is that right?

A. Yes, sir, there was too much. [33]

Q. Did you have to work overtime to get all this work done, Mr. Nitcy?

A. Sometimes they kept me overtime.

Q. And, I presume, you were paid overtime?

A. Yes, sir.

Q. Now, let's turn to this alleged injury of February 10, 1950. You were working with Mr. Bogardis, did you say? A. Yes, sir.

Q. You had done this same job before, is that correct? A. That is correct.

Q. You had worked with Mr. Bogardis doing the same thing? A. Yes, sir.

Q. About how often does that barrel of oil have to be put on this little stand?

A. That would depend on the engines that would have to be washed. If there were lots of engines it wouldn't last long and if there aren't many it would last a long time.

Q. How about a week or two weeks?

A. It would last longer than that.

Q. Six months?

(Testimony of James A. Nitcy.)

A. No, not like that, probably every two weeks.

Q. And that is about your average?

A. I would say that, yes.

Q. And that was one of your regular jobs, that you did with Mr. Bogardis?

A. All of us put up the barrels, as far as that is concerned, [34] but when it fell on our shift we had to put it up. If it fell on the other fellow's shift he was supposed to put it up.

Q. Then you were familiar with the job, is that right? A. Yes, sir.

Q. You knew it had to be done?

A. Yes, sir.

Q. And was it done in the same way always, with the same tools and appliances?

A. That is the only way that it could be done, that is all there was there to do it with.

Q. In other words, one man wheeled and the other man pulled?

A. The other man pulled, yes, sir.

Q. Then what makes this occasion so unusual?

A. Because Mr. Bogardis tipped this off on its side instead of setting it on its end.

Q. Is that the first time that ever happened?

A. I don't know, I know it's the first time it ever happened with me.

Q. And when it went on the ground, did you complain that it was too much to do then to lift it up two feet?

A. No, I didn't complain, I just told Mr. Bogardis that I had hurt my back on it.

(Testimony of James A. Nitey.)

Q. While it was laying there on the ground, did you complain that you didn't want to lift it, or anything of that kind, [35] that it was too much work for you to do? A. No, I didn't.

Q. You didn't complain? A. No.

Q. You just went ahead and lifted one end, you lifted one end, as I understand?

A. We had to set it up on end in order to get it on this stand.

Q. The barrel had to be stood on end and then you rocked it over?

A. Just rocked it right over, stick this nose under the end and rock them both over.

Q. And that is what the job consisted of, sitting the barrel on end and rocking it over?

A. There would be no use of me complaining when this was lifted up there and,—

The Court: —Now, Mr. Witness, just answer the question and then stop talking. These are easy questions to answer.

Q. I believe that you said something about the footing being bad or something like that?

A. It was sand, soft sand.

Q. And the footing was bad, is that right?

A. I didn't say anything about the footing being bad. I said that my feet were in the sand and I couldn't jump away from the barrel, naturally I was sunk down in that sand [36] because it was loose sand.

Q. Did that make the job any harder for you to do?

(Testimony of James A. Nitey.)

A. Well, it would make it harder to jump away from the barrel or to get out from under it.

Q. This sand that you speak about, that didn't make it any harder, it didn't require any more strain to lift it?

A. Absolutely, you can take a barrel and put it down on that hard floor right there and it won't take near the strength to lift it than it would if the barrel were down in soft sand. It won't take near as much strength to lift it off the floor as if it was sunk in the sand for six inches, it would just be a block up against it for six inches and you are just working against that block.

Q. Do you recall making a statement to Mr. Hinie of the Railroad Company on October 25, 1951, about this so-called accident?

A. He came there and examined me on it and took down some stuff.

Q. And you told him the truth as to just what happened? A. As near as I could.

Mr. Glasby: I am going to object again to this testimony concerning a conversation. I think that he would have to tell everybody that was there, the time [37] and the place and he would have to lay a better foundation.

Mr. Sharp: I believe I asked him if it was made on October 25, 1951, and if it was made to Mr. Hinie of the Railroad Company.

A. What date was that?

Q. October 25, 1951.

(Testimony of James A. Nitcy.)

A. I can't remember the date, he was there all right, I don't remember the date though.

Q. Did you sign a statement?

A. Yes, sir.

Q. Did you read the statement and then sign it?

A. What I could I did, I can't read very good and it was a sheet or two and I don't remember what it was, I remember that it was supposed to be what I told him there and I signed it.

Q. Will you look at each page of that, Mr. Nitcy, and tell me if that is your signature?

A. Well, yes, it looks like my signature.

Q. At that time did you tell Mr. Hinie,—did you make the following statement: "My footing was good, I didn't slip or trip while handling the barrel, but in the lifting I felt my back strain", did you make that statement?

A. My footing was good and I didn't slip. [38]

Q. Are you still saying that now, Mr. Nitcy, that your footing was good?

A. Certainly, I didn't slip.

Q. And your footing was good?

A. It was in the sand, I didn't slip, it wasn't a solid footing but it was in the sand, it was loose sand but I didn't slip.

Q. Was the footing good or wasn't it?

A. As far as slipping, that is all I can say as to that.

The Court: We will recess at this time until 1:30 this afternoon.

(Testimony of James A. Nitey.)

October 26, 1953, 1:30 p.m.

Q. Mr. Nitey, we were talking about this barrel episode, as I understood your testimony, what had to be done was that the barrel was lying on its side and it had to be put up, as you testified?

A. That is right.

Q. It had to be put up on its end and rocked over on to this two foot stand?

A. That is right.

Q. And as I understand it you didn't complain to Mr. Bogardis or anybody else prior to doing your part of this lifting?

A. Not that I remember.

Q. And after it happened you continued to work, is that right? A. That is right.

Q. And did you get a slip and go to the doctor then, by any [39] chance, did you go to the railroad doctor, Mr. Nitey?

A. I went to the railroad doctor, I don't remember when I got a slip, I paid my own way for a long time.

Q. You say that you paid your own way?

A. Yes, sir.

Q. Why didn't you get a regular slip?

A. Well, I didn't know that I could get one.

Q. You didn't know that?

A. No, I didn't understand it.

Q. Then as I understand it, you had not had a railroad slip to go to a railroad doctor before?

A. Not there at least.

Q. I beg your pardon?

(Testimony of James A. Nitcy.)

A. Not there, I hadn't.

Q. Had you at some other place?

A. I don't remember whether I did or not.

Q. You don't remember. Let me put it like this, prior to this episode of February 10 of 1950 did you get any slip from a foreman of the Milwaukee to go to a Milwaukee hospital association doctor?

A. I don't think I did.

Q. You don't think that you did?

A. No, I don't.

Q. Would you recall if you had?

A. Well, I don't believe I did because I didn't have nothing to go for unless it was something that I don't remember [40] now.

Q. Well, how about a cold or something like that?

A. Well, I guess I could have, I couldn't say about that.

Q. Well, while you were working for the Milwaukee you could have gotten a slip and gone to the doctor? A. What was that?

Q. I say, did you ever go to your foreman, while you were working for the Milwaukee, and get a medical slip and take it to the railroad doctor for treatment, either for an injury or illness?

A. I don't remember.

Q. Don't you think that you would remember if you had gone to the railroad doctor, in other words, if it is free service, would you remember about it?

(Testimony of James A. Nitcy.)

A. I went with this finger (indicating), that was at Marmarth, North Dakota.

Q. At Marmarth, North Dakota, how many years ago was that?

A. I couldn't say as to the date but it was quite a few years ago, I smashed a finger (indicating) and I went to the railroad doctor because I was working on the section at that time, but I don't remember whether I got a slip then or not.

Q. But the railroad took care of that?

A. Yes.

Q. Now, how about in 1946 or 1947 when you were working at this same place, the St. Maries Roundhouse, did you ever [41] go to the St. Maries Hospital there, to a railroad doctor?

A. Not that I remember, I didn't get no slip if I did.

Q. Did you know that the service was provided, that you could get treatment?

A. No, I didn't know that.

Q. When did you first find out that such service was provided.

A. Well, I don't just exactly remember when that was. There was a fellow there that told me when I was up at the desk. I told him that I was going to see Dr. Raff, I was just checking out at that time and I said I am going up to see Dr. Raff and give him three or four more dollars and he said, "Are you paying your own way?" and I said, "I certainly am and I have been", and he said, "You can get a slip".

(Testimony of James A. Nitcy.)

Q. When was that?

A. I don't remember the date of that, I never kept no track of it.

Q. Well, how about figuring in relation to these so-called injuries in February, from then on to October?

A. That was before the last injury.

Q. Before the last injury?

A. If I remember, I didn't keep no tally because I thought nothing of it.

Q. Then we have that clear, prior to the first injury you [42] never went to a Milwaukee Hospital Association doctor and you didn't know that such procedure was provided, is that correct?

A. I knew Dr. Raff was but I didn't know I could get a slip to go there because I was paying my own way and I didn't pay no attention to it.

Mr. Sharp: It seems to me that this is a bit conflicting.

The Court: Yes, it is. Now, Mr. Witness, if you will just answer the question and then quit talking, as I have said before, we will get along a good deal faster. Listen to the question that counsel asks and then just answer the question.

Q. Well, now, let's start over, prior to February 10th, 1950, did you ever go to a Milwaukee Hospital Association or a railroad doctor with a slip that you had obtained from your foreman, for any medical service?

A. I don't remember.

Q. If such a thing had happened would you recall it?

(Testimony of James A. Nitcy.)

Mr. Glasby: I object to that, I think it is argumentative.

The Court: This "don't remember" is quite an answer but I am going to permit him to answer this question.

A. Well, as I said, I don't remember. [43]

Q. When was the first time that you got a medical slip from your foreman and went to a Milwaukee Hospital Association doctor or a so-called railroad doctor?

A. I don't remember any date.

Q. I assume that if you had gone to a railroad doctor a few months before February of 1950 you would remember?

A. I don't know that I did because I don't remember about it.

Q. You said that you always paid your way?

A. I did pay my way from the time that I was hurt, from the time that I was hurt the first time up until I first started to get slips to Dr. Raff. I don't remember when I got the first slip.

Q. And prior to that,—prior to the first alleged injury you paid your own way?

A. As far as I remember, yes, sir.

Q. I take it that after this barrel incident happened, you didn't report it?

A. Yes, certainly I reported it.

Q. Oh, you did report it, who did you report it to?

A. To Mr. Stranberg and also to Mr. Harry Bogardis.

(Testimony of James A. Nitcy.)

Q. You were working with Harry Bogardis, I believe you said?

A. Yes, sir, and I told him.

Q. And you didn't get a slip from Mr. Stranberg?

A. No.

Q. That is, to go to a doctor? [44]

A. Not at that time, no, sir.

Q. Now, Mr. Nitcy, let's turn to the date of October 13, 1950, you mentioned something about working on the front end of an engine, had you done that work before?

A. On the big engines, yes, that was a freight engine.

Q. And you had never worked on this sized engine?

A. I don't remember that, I don't remember just what engines I worked on.

Q. Well, I believe that you said that it was different than what you worked on, than the Malley type which you had worked on?

A. Yes, sir.

Q. If you had worked on one of these prior to that time would you recall that?

A. I could have worked,——

Q. ——I mean on the front end, Mr. Nitcy, the same kind of a job that you were doing at that time?

A. I don't remember whether I did or not.

Q. When you were asked to go up there and loosen these bolts or to tighten them, I guess they were loosened?

A. Well, I wouldn't say as I loosened them, I

(Testimony of James A. Nitey.)

think he had the front end open but I wouldn't say that for sure. I had cleaned up the sand and I was tightening them when I got hurt.

Q. He had probably been up there and opened that up? [45]

A. Yes, I think he opened the engine.

Q. That is what I say, and then you were asked to clean out the sand? A. Yes.

Q. And you had done that job before, had you not? A. Yes, I had.

Q. On that type of an engine?

A. Not that I remember, but on the Malleys I had.

Q. Did you ask for any help when you were told to go up there?

A. On this particular little engine?

Q. Yes. A. No, I didn't.

Q. You didn't complain about going up there?

A. I asked just where I was to stand, I said "Where will I stand" because there was just this little narrow place there to stand on the headlights.

Q. And now just answer my question please,—you didn't complain before you went up there?

A. No.

Q. The tool that you used up there was a wrench, what kind of a wrench was it?

A. An open end wrench.

Q. That would be a solid wrench?

A. No, it would be an open end wrench, a solid

(Testimony of James A. Nitcy.)

wrench would be a box wrench, that would fit all around the bur or nut. [46]

Q. But this was just one piece of metal?

A. Yes, with a U to fit over the end.

Q. Was that the usual and customary tool to use there?

A. That was all I ever used on the Malleys.

Q. Did that wrench come with the engine?

A. No, that was in the roundhouse, at the desk there where they kept it.

Q. There was nothing wrong with the tool, was there?

A. Well, all of those open end wrenches are naturally loose and you have to be careful that they stay on the bur.

Q. You mean that the wrench is loose?

A. Yes, the wrench is loose, it is a little bit wide and they are wore and battered, most all of the open end wrenches.

Q. Do you recall this statement that we discussed that you made to Mr. Hinie. You remember the statement of October 24th or 25th, 1951?

A. Some of it.

Q. You remember signing it, do you?

A. Yes.

Q. Do you remember saying, "There was nothing defective about the wrench I was using and it did not slip on the bolt"?

A. That is correct.

Q. That is correct?

A. Yes, it did not slip on the bolt. [47]

(Testimony of James A. Nitey.)

Q. As soon as this happened did you get a slip and go to a Milwaukee Hospital Association doctor?

A. I don't understand.

Q. As soon as this happened, this October 13 incident up on the engine, I believe that you testified that you came down from the engine,—then did you go to a Milwaukee Hospital Association doctor? A. I went to Dr. Raff.

Q. On that same day?

A. No, not that same day.

Q. You didn't? A. No.

Q. Then you didn't get a slip and go to the doctor? A. No.

Q. When did you first get a slip and go to him?

A. I don't remember when I got the first slip, I never kept no track of when I got that first slip.

Q. But you did go to Dr. Raff?

A. Not that day.

Q. How soon after did you go?

A. I would say it was four or five days after.

Q. Did you tell him that you were injured then?

A. Yes, I did.

Q. But that same day you did go to a doctor, as I understand it?

A. Yes, sir, to Dr. Miller, a chiropractor. [48]

Q. A chiropractor? A. Yes, sir.

Q. And that night you went to another chiropractor? A. No, sir.

Q. How about this Dr. Critchley?

A. I went to him the next day.

Q. Was he a railroad doctor?

(Testimony of James A. Nitey.)

A. No, I don't think so.

Q. Maybe I have covered this but if I did I didn't get it clearly, how soon was it that you went to a doctor,—a company doctor after this episode of October 13?

A. It was four or five days after.

Q. And then you continued to work, as I understood it, you continued to work for how long, Mr. Nitey?

A. Yes, that's right, I continued to work.

Q. For how long?

A. Well, I worked until I laid off until 1951.

Q. What part of 1951?

A. I think it was the eighth.

Q. You mean the eighth month?

A. The 8th of October, I think.

Q. That was about a year then, you continued to work for about a year?

A. Yes, sir, trying to get cured, trying to get well.

Q. Do you say that you were bothered after this episode, [49] did you have to lay off work because of this condition?

A. At times, yes, sir.

Q. How often did you lay off work?

A. Whenever I got so lame that I couldn't go to work, I would go to a doctor and get relief,—I would get relief for a day or two of some kind.

Q. Were you off for any length of time, say approximately a week or so?

A. I don't just remember that.

Q. Were you off for two weeks for a vacation?

A. I was never off for two weeks, I was not eligible for a two weeks vacation. I took a trip for

(Testimony of James A. Nitcy.)

two weeks back East, I was called back East on account of sickness.

Q. That was after October 13, 1950, episode and prior to the time that you quit in 1951?

A. That was before,—that was before I was hurt the second time.

Q. My question is this, you claim that you had this injury on October 13, 1950, and that you worked up to October 8, 1951. Now, during that period of time were you off because of this back condition?

A. I think that I had a vacation for one week at that time.

Q. You had a vacation? A. Yes.

Q. Otherwise you worked continually, did you?

A. Well, outside of laying off to go to the doctor or something.

Mr. Sharp: Is your doctor here yet, Mr. Glasby?

Mr. Glasby: Yes, the doctor is here.

The Court: Then I will permit this witness to step down. I have always made it a rule to allow counsel to use the doctors when they come. They are quite busy people these days.

DR. H. DON MOSLEY

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Glasby): What is your occupation?

A. Physician and surgeon.

(Testimony of Dr. H. Don Mosley.)

Q. And where did you take your training and how long did you train before you went into the practice of medicine?

The Court: I wonder if you will admit the doctor's qualifications.

Mr. Sharp: Yes, we will admit that.

Mr. Glasby: I had a question or two that I wanted to ask the Doctor.

The Court: Go ahead, you may ask anything you want, I thought it would save going through [51] all of the days he went to school and all the time he was an intern and such qualifications. Go ahead.

Q. Doctor, would you give us a brief summary of the work that you have had professionally on the bones, the treatment of bones and particularly the spine?

A. I graduated from the University of Tennessee and took one year of internship at St. Anthony Hospital at Oklahoma City, Oklahoma. Following that I had one year of general surgery at the same hospital, the St. Anthony Hospital at Oklahoma City. Immediately following that I went into the service as a general surgeon, during the period of time that I served overseas, approximately 18 months, that was either acting as or chief of surgery of the 183rd general hospital, which included all general surgery, orthopedic, O.B.G.Y.N, and general surgery. After being discharged from the service I became affiliated with the Western Hospital Association at St. Maries, Idaho, being super-

(Testimony of Dr. H. Don Mosley.)

visor and general surgeon for the Milwaukee Railroad, being chief surgeon for the Milwaukee Railroad and supervisor of the hospital up until the hospital was sold. The Western Hospital Association was dissolved sometime in March, April, May or June of 1950. Following the disposition of the hospital by the Western Hospital Association I moved to Coeur [52] d'Alene where I have been in the general practice with emphasis upon general surgery, since July of 1950.

Q. Have you done quite a bit of bone work?

A. While managing and supervising the St. Maries Hospital for the Western Hospital Association which at that time was engaged in contract work,—logging contract work, we came in contact with much traumatic orthopedic surgery.

Q. What does traumatic mean, Doctor?

A. Our main condition which we had, were logs rolling over someone, fractured backs, fractured pelvis, fractured legs, simple and compound, with various complications. It would take quite a long time to explain all the conditions that we came in contact with.

Q. Doctor, you said that you had some position with the Milwaukee Railroad, would you explain what that position was and tell us who your superiors were and if you had any subordinates, who they were, give us a short explanation of the set-up of the Milwaukee doctors at St. Maries and in that area?

A. Being district surgeon for the Milwaukee

(Testimony of Dr. H. Don Mosley.)

Railroad Company I covered all of the area from East Portal, which I believe is directly across the Montana-Idaho border, to Maldon, that included all of the branch lines of the Milwaukee Railroad. [53]

Q. Who was your immediate superior?

A. When I first accepted the position Dr. Allen of Seattle was the chief surgeon of lines west on the Milwaukee Railroad. I do not know when our present chief surgeon took over, I have no idea.

Q. How many districts were there in the west?

A. You mean in lines west?

Q. In lines west?

A. I am not sure but I believe there were three or four.

Q. And you were one of three or four?

A. Yes, sir.

Q. Do you have any subordinates?

A. Yes, all of the local surgeons come under the district surgeons for elective surgery or non-emergent surgery, that is, Spokane, Maldon, Rosalia, Avery, Coeur d'Alene, Boville and all the branch lines.

The Court: It seems to me that we are taking up a lot of time unnecessarily, the doctor's qualifications have been admitted.

Q. Dr. Mosley, have you ever examined the plaintiff in this action, Mr. Nitcy?

A. Yes, sir.

Q. When was the first time that you examined him?

(Testimony of Dr. H. Don Mosley.)

A. I would not be sure without my notes, but I think it was in July of 1952. [54]

The Court: You may refer to any notes you have concerning your examination and treatment, Doctor.

Q. Did Dr. Raff ever consult with you prior to 1952 with regard to the plaintiff in this action?

A. I do not know, I don't recall.

Q. You don't remember of that?

A. No, sir.

Q. Doctor, what did your examination in 1952 reveal?

A. In detail I do not believe that I can give all of the findings, but he came in with a chief complaint,—you want the physical findings?

Q. That would be fine.

A. He came with a history of having had previous trouble with his back for quite some some, I don't know whether it was 18 months or two years, I wouldn't know about that without referring to my record and I am sorry I don't have my records with me.

Q. That would place the time around 1950, would it, Doctor?

A. Yes, at the time of the examination the man was having some difficulty with his back, stiffness, pain and inability to stay in one position for any period of time, then upon physical examination there was tenderness in the low back area which would be expected from [55] his history, so to speak. There was tenderness over the lower ver-

(Testimony of Dr. H. Don Mosley.)

tebra, he did not have any of the signs,—he did have symptoms of left sciatica radiating down into the leg. I mentioned that he had no signs, the reflexes were normal and there was no atrophy and no shriveling up of either leg or thigh, but he did have a marked spasm which gave him an abnormal curvature of the spine, due to muscle spasm. That was my impression at that time. The man had stated that he had been unable to work for several months. The reason for examining the individual on the first contact that I recall was for the filling out of papers to be sent back to some railroad commission or bureau for his liability or something of that kind, as I recall, that was the first contact that I had with this patient.

Q. And what were your findings on that report, Doctor?

A. My findings on that report were based upon a review of X-ray which the man brought to me, history, symptomatology and my objective findings upon examination. These were,—I will try to give them as briefly as possible, the first, X-ray which the individual brought to me at the time, for review, and I believe that was sometime in July of 1952, showed a lipping or spur formation between the third and fourth lumbar vertebra,—a deviation of the spine to the right in a curvature which was considered to be due to [56] spasm of muscles on the left side, making it a something like a bow-string. On one film there was a questionable fractured vertebra in the thoracic or dorsal region, in

(Testimony of Dr. H. Don Mosley.)

the rib cage, the 10th and 11th. There are 12 vertebrae in the chest or rib cage. Those were the significant findings on the X-rays. The history, of course, was subjective, he gave a history of having injured his back sometime in the early 1950 and again in the latter months of 1950 although he stated, I believe, that he had not been hospitalized for either ailment. The objective findings were that the man had limited flexion ability at the hips which would allow him to extend his hand barely below the knees. There were muscle spasms on the left lumbar spinal musculature. On deviation to the right the motion was much less than on deviation to the left. On hyper-extension there was a minimal amount of extension ability. There were no signs of anesthesia, no signs of muscle atrophy, the reflexes were normal in both of the lower extremities.

Q. Doctor, did you, at that time, determine in your opinion the man's ability to work at his usual occupation? A. Yes.

Q. And what did you determine that to be?

A. Well, it was very apparent, objectively, that the patient would be unable to go back into common labor. [57]

Q. Doctor, were you subpoenaed to come here?

A. I beg your pardon?

Q. Were you brought in here under subpoena?

A. Yes, sir.

Mr. Glasby: I believe that is all I have under direct examination.

(Testimony of Dr. H. Don Mosley.)

Cross Examination

Q. (By Mr. Sharp): Doctor, in lay language would you say that the condition of his back is mainly due to arthritis?

A. He has some arthritis. Arthritis does not come on suddenly and acutely. Hypertrophic arthritis does not come on suddenly or acutely without some precipitating cause.

Q. I believe you said that hypertrophic arthritis does not come on suddenly, what is hypertrophic arthritis?

A. Hypertrophic arthritis in its definition, I believe, to the best of my knowledge, is a building of bone or a lipping or a spur formation which cannot occur spontaneously or immediately.

Q. Then it is a growth, more of an illness than something brought on by injury?

A. On hypertrophic arthritis it is rare to find an infectious process has been responsible for the building up of the [58] spur formation or bone. It is most commonly found in the weight bearing joints of the body, the hips, the knees, and the lumbar spine. Also in an individual who has carried on hard manual labor with repeated attacks of trauma or with some acute episode which produces it.

Q. About how many people have arthritis that are over 50 years old, that is, people that you have examined, is it a pretty common disease or matter in people of that age?

(Testimony of Dr. H. Don Mosley.)

A. It is not uncommon in anyone over 55 or 60 years of age.

Q. Doctor, supposing it shows up,—supposing that a doctor finds arthritis and what if the patient or individual follows their or his normal work, would it increase, would the condition get worse, that is, osteo-arthritis?

A. Osteo-arthritis and hypertrophic arthritis are synonymous. If one led a sedentary life after having developed hypertrophic arthritis there should be no reason for any progressive change. I wondered if I understood you.

Q. That was my question, yes, Doctor. You say that this man does have an arthritic condition?

A. In localized joints. [59]

Q. And by localized joints you mean in a certain area?

A. A certain area,—perhaps I could put it better this way, generalized arthritic condition afflicts all of the joints and there has been some precipitating cause when the joints involved are localized.

Q. You mean it could be a number of traumas or continued hard work, is that what you mean, Doctor?

A. Yes, that is right.

Q. You examined this man first in July of 1952, is that correct?

A. Yes, I believe that is right.

Q. And his mention of injuries, that is what he told you, isn't it,—he told you of certain alleged injuries, is that right?

A. Yes.

Q. But of your own personal knowledge, of

(Testimony of Dr. H. Don Mosley.)

course, you cannot testify to that, whether he had injuries or not? A. No, sir.

The Court: We will take a fifteen minute recess at this time.

October 26, 1953, 2:30 p.m.

Q. Doctor, I think I was asking you about the so-called injuries related to you, those were things that he told you and, of course, from your observation you [60] could not say one way or another about them?

A. Other than the evidence on the X-rays.

Q. Yes, but other than the condition of his back,—as far as his claiming that he was hurt on such and such a date, from lifting a barrel on such and such a date. When you examined him two years later it was just what he told you about that, that is what you had? A. That is true.

Q. The condition of his back, of course, that was apparent from your examination?

A. That is right.

Q. And you testified that you found no evidence of atrophy at all?

A. No evidence of atrophy of the muscles.

Q. There was no shriveling of the leg?

A. That is right.

Q. And the reflexes, I believe you said, were normal? A. Yes.

Mr. Sharp: I think that is all.

Redirect Examination

Q. (By Mr. Glasby): Dr. Mosley, assuming that

(Testimony of Dr. H. Don Mosley.)

those injuries that showed up on your objective findings were fresh and assuming that you had been called on the case, what treatment [61] would you have given?

Mr. Sharp: We object to that, if the Court please, we must object to that type of questioning. These injuries that he speaks of, we don't know anything about that.

The Court: That is right, the assumption is based on facts that are not in evidence. The objection is sustained.

Q. Dr. Mosley, if you were to find a person with evidence as you found present on Mr. Nitey's back shortly after the injuries, what treatment would you prescribe?

Mr. Sharp: We must make the same objection.

The Court: The same ruling.

Mr. Glasby: Do I understand that the ground of sustaining the objection is that there is no evidence to show that this condition of the back was caused by the injuries?

The Court: Of course, Mr. Glasby, the Court is not under cross examination here, the Court just rules. But for your benefit, although it is entirely out of order for the Court to be questioned by counsel as to its reason for any ruling, for your benefit I will say that there was no evidence upon which to base the assumption. Your [62] assumption was based upon something not in the record and an expert cannot give an opinion upon a matter or upon a hypothetical question, in answer to

(Testimony of Dr. H. Don Mosley.)

such question unless there is some evidence in the record upon which to base that question. Now, you may go ahead.

Q. Dr. Mosley, didn't you testify that there was some evidence of a compression fracture in Mr. Nitcy's back?

A. I am not sure that is the question I was asked nor the answer that I gave.

Q. Did you find some evidence of a compression fracture in the back of James Nitcy?

A. Yes, there was some evidence of a minimal compression fracture.

Q. Doctor, what would be your treatment of a minimal compression fracture?

A. That is a difficult question to answer, it would depend upon the findings at the time of the initial visit and also the findings at that time. Ordinarily they are treated by immobilization and some support and, of course, something for the pain,—I am not right sure that I understand your question.

Q. Well, how would you treat a compression fracture, that was my question? [63]

A. Well, repeating, it would depend, to a degree on the condition of the patient and, of course, the degree of the injury, ordinarily they are immobilized and some form of support given, some form of cast or back support and hospitalization and symptomatic treatment, pain relievers, and so forth.

Q. Now, just so this point can be clarified a little. I believe you stated on your examination in

(Testimony of Dr. H. Don Mosley.)

regard to this arthritic or spur formation, you stated that a localized formation of that kind would be precipitated by something, will you clarify that, Doctor, just what do you mean by precipitated by some force?

A. Yes, ordinarily any hypertrophic arthritis is due to trauma.

Mr. Glasby: That is all.

Recross Examination

Q. (By Mr. Sharp): Ordinarily and normally under the condition due to trauma, would you say, Doctor, based on your experience in examining people who have worked quite a bit at physical labor or what may be referred to as common labor, a person who has done hard work all of his life, is he more liable to have that condition than anyone else?

A. You mean hypertrophic type of arthritis?

Q. Yes. A. That is true.

Q. Which is what you testified that your examination disclosed that this man had?

A. That is right.

Q. And by trauma, Doctor, that could be many incidents over the years? A. That is true.

Q. Doctor, what do you mean by minimal? I believe you said that there was some evidence of a minimal compression fracture, what do you mean by that?

A. One can have an acute compression fracture with the vertebra going down to possibly one-half

(Testimony of Dr. H. Don Mosley.)

the depth on one side and coming up to the normal depth on the other side, and then one can have a compression fracture in which there is very little, in fact, no compression of the vertebra but with the tip fractured.

Q. And do you mean by that a spur fracture?

A. Well, it would result in a spur in a matter of time.

Q. And that is the condition of Mr. Nitcy's back, the minimal fracture?

A. I beg your pardon?

Q. That is the condition, the last description you gave, the minimal compression fracture?

A. Yes, that is right, as far as I can tell from observation [65] and studies that I have reviewed. There is no smashing down of the vertebra to a degree where it is one-half as thick as the one below, do I make that clear?

Q. Yes.

Mr. Sharp: That is all.

Mr. Glasby: That is all. And now I will recall Mr. Nitcy.

JAMES A. NITCY

being recalled for continued cross examination.

Cross Examination—(Continued)

Q. (By Mr. Sharp): I think, Mr. Nitcy, that you testified that in 1947 you consulted with Dr. Miller, a chiropractor, near St. Maries rather than the one in Spokane, but that was not for the back condition, is that right?

(Testimony of James A. Nitcy.)

A. Which Dr. Miller do you refer to?

Q. The one in or near St. Maries, I believe that you said that you consulted with him in 1947, is that correct?

A. I don't remember whether I did or not in 1947.

Q. If you had consulted with him in 1947 for a back condition, would you recall it?

A. I think I would. I might have been there for a sore muscle or something like that but not for a back injury.

Q. How about 1948, would your answer be the same as to that year, 1948? [66]

A. Yes, it would.

Q. No back condition?

A. Yes, sir, no back injury.

Q. And what about 1949? A. No.

Q. And 1950?

A. Yes, I went to him in 1950.

Q. For what? A. For my back.

Q. And when was that?

A. I don't remember the date, I never kept track of the date.

Q. Was it before or after the so-called barrel episode? A. It was after.

Q. Was it after the episode on the engine?

A. Yes, it was.

Q. One more question, I don't believe I covered this. When you testified that you were working on this type C engine, the wrench was in your right hand and you were holding on with your left hand,

(Testimony of James A. Nitcy.)

is that correct? A. That is correct.

Mr. Sharp: That is all the questions we have.

Redirect Examination

Q. (By Mr. Glasby): Just to clarify this one matter. What was the usual [67] and ordinary method of loading these barrels of oil on to this sled?

A. When you wheeled them in there on this two-wheeled cart or truck you set them on end. You had to get them on end in order to get this framework under them.

Q. You had loaded other barrels and you always had them upright, is that correct?

A. That is right.

Q. And this was the first time a barrel had gotten down in a horizontal position for you, is that right? A. Yes.

Q. What caused it to get into this position?

A. Well, when we pulled up there this sand hole was there, filled with sand and one wheel of the truck naturally dropped off in the hole there and, of course, Harry tipped it on over and it went down on its side. That caused us to have to lift it up again.

Q. Could you say whether he could have prevented that barrel from going over?

A. I think he could have.

Q. Were there any other types of truck around there to use? A. No, there wasn't.

(Testimony of James A. Nitcy.)

Q. Was there at any time after that any other kind of truck there to use?

A. Yes, there was.

Q. And what were they? [68]

A. They were regular barrel trucks with hoops, two-wheeled trucks that were dished out in the shape of a barrel.

Mr. Sharp: I think, if the Court please, that plaintiff's counsel is going beyond his redirect examination now and is bringing up something that certainly was not testified to in any cross examination, and I make a motion at this time that it be stricken from the record and the jury instructed to disregard it.

The Court: Your objection is well taken but I will allow him to reopen his case and put in further redirect if he cares to.

Mr. Glasby: I will ask permission to reopen at this time.

The Court: You may go ahead. I will permit counsel to go ahead and put in anything he wants to. However, you will have an opportunity to re-cross examine the witness if you care to.

Q. After this February 10th incident were there any other types of trucks provided?

The Court: Of course, I will sustain the objection formerly made now to this question because what happened after this does not make any difference here and the jury is instructed to disregard this question and answer. It can only be prejudicial

(Testimony of James A. Nitecy.)

in [69] this matter as it has nothing to do with this case.

Q. Was your work on that engine done under any direct supervision?

A. I don't understand.

Q. Were you directly supervised in doing your work on this engine?

A. What do you mean by supervised?

Q. Does anybody direct you how to do the work? A. Yes, sir.

Q. And they directed you to do that specific job, did they? A. Yes, sir.

Mr. Glasby: That is all.

Mr. Sharp: No questions.

H. C. HARTMAN

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Glasby): Do you know the plaintiff in this action? A. Yes, sir.

Q. And how long have you known him?

A. Since the time he first started to work for the Milwaukee in St. Maries, I guess that was about 1947 or 1948.

Q. Did he work continuously from 1947 on? [70]

A. He was on days at one time and then he worked nights and then he was off and came back again.

Q. Do you remember when he came back?

(Testimony of H. C. Hartman.)

A. I don't remember the dates.

Q. Did you work with him some?

A. I worked with him around the roundhouse.

Q. Have you observed him working?

A. Yes.

Q. Do you know anything about the kind of workman he was?

A. Well, Jim was a good worker when he was on the job.

Q. Do you know what job he was hired to do there? A. Labor.

Q. Do you know if he did anything else around there? A. Yes, he helped me some.

Q. And what type of work was that, when he helped you? A. That was boiler work.

Q. Boiler-maker?

A. Boiler-maker's helper.

Q. Is that a particular classification, boiler-maker's helper?

A. Yes, it is, it takes time for a helper to get the experience where he would be capable of being a helper.

Q. How long would you say it would take?

A. It all depends on the man, all the way from one to three or four years to make a good helper.

Q. Did Jim, to your knowledge, do a lot of boiler-maker's helper work? [71]

A. Just when I needed a helper, I couldn't say how much he did, I just took a laborer whenever I needed a helper.

(Testimony of H. C. Hartman.)

Q. Did you ever have an experienced helper to work with you?

A. I had an experienced helper until he was laid off.

Q. Do you remember when it was?

A. It was around 1949 or 1950, I couldn't say exactly.

Q. How long have you worked on the railroad?

A. About 32 years.

Q. And in what capacity have you worked?

A. As boiler-maker.

Q. You always worked as a boiler-maker?

A. Except when I was learning the trade.

Q. And how long did it take you to learn the trade?

A. Four years.

Q. Have you always worked for the Milwaukee?

A. No.

Q. What other railroad have you worked for?

A. For the Northern Pacific, the Alaska Railroad, and the Milwaukee.

Q. Where for the N. P. did you work?

A. You say where?

Q. Yes.

A. On nearly the whole system, I worked up at Dilworth, Minnesota; Livingston, Montana; Jamestown, South Dakota; Spokane, Washington; Seattle and Tacoma. [72]

Q. Does a boiler-maker, when working in these shops, always have a boiler-maker's helper with him?

A. In the shops, yes, that is in the bigger shops.

(Testimony of H. C. Hartman.)

Q. Is a boiler-maker supposed to have a boiler-maker's helper?

A. Yes, it is practically compulsory, a boiler-maker cannot do much without one.

Q. Did you always have a boiler-maker's helper at St. Maries?

A. Only until the one that I had got laid off, after that I didn't have one.

Q. Did you complain about that to the Railroad Company?

A. I said that if they didn't give me a helper they would have to give whoever did help me helper's wages.

Q. And what did you do for help when you couldn't have a boiler-maker's helper?

A. I had to have a laborer.

Q. And did the plaintiff in this action help you some? A. Yes, sir.

Q. Do you remember any occasion or any incident that happened while the plaintiff was working for you, any injury?

A. The only thing was when he was tightening the lugs on the front end door, he was up on the headlight, standing on the headlight bracket and when he came down he said [73] he had kinked his back. I was standing down below and I didn't see anything that happened that would cause it.

Q. You didn't actually see the injury?

A. No, he told me that he had a kink in his back.

(Testimony of H. C. Hartman.)

Q. Was that a rather simple job that he was doing there?

A. It was as far as being heavy work is concerned, if that is what you mean. It was not heavy work but it was a little awkward to get at.

Q. Was it necessary that he stand in an awkward pose to get at this?

A. Yes, there was no way to get out of it.

Q. How big a space is this headlamp?

A. Well, the headlamp itself is about 12 inches in length and then it stands away from the front end about six or eight inches.

Q. And that is what he had to stand on, was it, this headlamp?

A. Between the headlight and the front end, yes.

Q. Was there quite a large space for him to stand in there?

A. Just a slot of about eight inches.

Q. About eight inches all the way across?

A. About eight inches from the front end to the back of the headlight and about 18 inches wide.

Q. Is that ample room up there to stand?

A. Yes, plenty of room to stand. [74]

Q. Could you explain to the jury about how big a place that was?

A. Yes, it was about that wide and about that long (indicating).

Q. And was that the same thickness all the way across there? A. Yes.

Q. And it didn't taper down to a small point any place? A. No.

(Testimony of H. C. Hartman.)

Q. Was the plaintiff an experienced helper?

A. No.

Q. Would you say that he was a green hand at that? A. Yes, he was.

Q. And did you have to tell him what to do and how to do it? A. Yes.

Q. And did you tell him on that day?

A. Yes, I guess I did, I must have told him because he was up there tightening them up.

Q. Did he work under your supervision?

A. Yes, under my supervision.

Q. And what equipment was there to work with?

A. A three-quarter open end wrench.

Q. You say that you have worked for other companies, have you usually worked in round-houses?

A. Both in roundhouses and repair shops. [75]

Q. Now, in Seattle—

Mr. Sharp: —If the Court please, I think that if he is going to interrogate him as to custom he will have to have a better foundation.

The Court: I don't know what he is going to ask yet. Go ahead, Mr. Glasby.

Q. What equipment was provided in some of these other shops for your work?

A. You mean for that same type of work?

Q. On engines, high on engines?

A. Wherever you worked high on engines they have scaffolding,—a job of this type, of course, didn't use a scaffolding because it wasn't big enough

(Testimony of H. C. Hartman.)

to put up the scaffolding, in fact it would be in the way if you did have it.

Q. Have you done work in these other shops on front ends of this type of engine?

A. Well, similar to that but not this particular type.

Q. And did you use a scaffolding for work high on those?

A. Not this type of work that we were doing at this time, no, sir.

Q. Working on these doors, that is, where the doors happen to be taken off for cleaning, how was that done in these other shops?

A. Taking off the doors on the front end, they have cranes, they take them off with cranes. [76]

Q. And then what did you stand on to work?

A. They put a permanent stage there to stand on, they have a proper staging for you.

Q. Did they have a proper staging at St. Maries? A. No.

Q. Did they have anything at all in the way of staging?

A. Not that you could use there, no.

Q. Did they have any way to build scaffolding at all around there? A. In St. Maries?

Q. Yes.

A. We had a makeshift scaffolding, the planks were pretty well shot that we used to wash the front end of the engines there.

Q. You say the planks were pretty well shot, were they in good condition?

(Testimony of H. C. Hartman.)

A. No, they were not.

Q. What would you say would be a safe method for a green hand to do this type of work that Jim was doing that day?

A. For that type of work he would have to use his own judgment as to how he would get up there and hang on, he would have to use his own judgment for his own safety.

Q. They didn't have anything around there for him to use, is that right?

A. No, they didn't. [77]

Mr. Sharp: I think that these questions are leading.

The Court: The witness has already testified that they didn't use any scaffolding on a job of that kind, so I don't see how scaffolding would have anything to do with this matter at all, it seems to me that all this is immaterial.

Mr. Glasby: I think that is all.

Cross Examination

Q. (By Mr. Sharp): Mr. Hartman, you testified that you had a helper until about 1949 and that he was laid off, why was that?

A. I didn't hear the question.

Q. You testified that you had a helper until about 1949 and that he laid off or was laid off, why was that?

A. They were reducing the force, there wasn't enough work.

Q. In other words, the amount of work that

(Testimony of H. C. Hartman.)

went through that roundhouse was cut down, is that right? A. That is right.

Q. Did you have enough work to keep you busy?

A. No, I wasn't always busy myself.

Q. Now, this particular job that you were doing on that day, I believe that you testified that it was a rather simple job, is that what you said? [78]

A. Yes, it was, all that you had to do was tighten up three-quarter inch nuts.

Q. Tighten up three-quarter inch nuts with an open wrench, is that right?

A. That's right.

Q. Had you ever done that job yourself?

A. Yes, sir.

Q. Throughout these 32 years of experience I presume you have done it a good many times, is that right? A. Yes.

Q. I think that you testified, Mr. Hartman, that there was an eight by eighteen inch plate to stand on up there, was that what you said?

A. About 18 inches long and six or eight inches wide.

Q. And that was to stand on while you were working? A. That is right.

Q. And you say there was no scaffolding because the job wasn't big enough, is that right?

A. That right.

Q. What type of engine was this that you were working on? A. A C 1200 type.

Q. Was that a small engine?

(Testimony of H. C. Hartman.)

A. Yes, sir.

Q. And you say scaffolding or staging would have been in the way, is that right? [79]

A. That's right.

Q. I believe you stated that you were watching him up there, did you see any injury?

A. I didn't see anything.

Q. All you know is what he told you when he got down? A. Yes.

Q. And what did he say?

A. He said he got a kink in his back.

Q. And do you recall if he came to work the next day? A. I am pretty sure he did.

Q. And do you recall if he said anything more to you about it after he came back to work?

A. No.

Q. Do you mean no, he didn't say anything or do you mean that you don't recall?

A. I don't understand.

Q. Did he say anything more about his back after he came back to work the next day?

A. No, not to me, no, sir.

Q. And you worked with him after that, did you?

A. Off and on when I needed him, I was right there in the roundhouse with him.

Q. And this particular roundhouse, as operations go, is a pretty small one, isn't it?

A. Yes, it is. [80]

Q. In 1950, about how many men were working a shift in that roundhouse?

(Testimony of H. C. Hartman.)

A. The day shift had the most, they had about six or seven.

Q. Six or seven on a shift?

A. On the day shift, they had the most.

Q. The three-quarter inch wrench, is that the usual type of wrench to be used for that job?

A. Yes, he was using the proper wrench.

Q. It was the proper tool to tighten those nuts?

A. Yes, it was.

Q. And there was nothing defective about that tool, is that correct?

A. There was nothing defective.

Q. You were watching while he did the job,—did anything slip or did he fall or was there anything unusual there?

A. Nothing unusual at all.

Q. And you would not have known that there was anything unusual except that except that when he got down he mentioned the kink in his back?

A. That is right.

Q. Had he ever mentioned anything about going to a chiropractor to you?

Mr. Glasby: We object to that as immaterial and it would be pure hearsay.

The Court: I will let him answer. [81]

Q. Do you recall him mentioning anything to you about going to a chiropractor?

A. He told me that he was going to a chiropractor, yes, he told me several times.

Q. Do you recall, was that before or after this incident?

(Testimony of H. C. Hartman.)

A. I wouldn't say which it was, no.

Q. Do you ever remember him complaining about his back when he came back to work in 1949?

A. No, I can't remember it now.

Q. You can't recall whether he did or did not?

A. No.

Mr. Sharp: That's all the questions I have.

Mr. Glasby: I believe that is all.

BERNARD M. SORENSON

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Glasby): Are you acquainted with the plaintiff?

A. He worked down at the boiler room off and on.

Q. When was that?

A. I think it was back in 1947.

Q. Do you know his ability as a worker?

A. He was pretty good, he wouldn't be able to do it if he [82] wasn't any good.

Q. It was hard work that you were doing, was it?

A. It was firing a furnace, and it was hard, I was in there for 27 years and I was supposed to know.

Q. And you would know whether a man was a good worker or not? A. Of course.

Q. And you considered him to be a good worker?

(Testimony of Bernard M. Sorenson.)

A. He was a good worker, yes, sir.

Mr. Sharp: We have wasted a good deal of time on this finding out whether he was a good worker or not and I don't see where it has anything to do with this case.

The Court: I fail to see that myself, but maybe we would like to know what kind of a worker he was.

Mr. Sharp: I will concede that he was a good worker.

The Court: It really doesn't have anything to do with this case.

Mr. Glasby: That was the purpose of calling this witness, to show that he was a good worker.

The Court: Then if that was the purpose I think you might as well excuse the witness.

Mr. Glasby: That is all. [83]

The Court: You may step down. You did not have any cross examination?

Mr. Sharp: No, no cross.

LEONA NITCY

called as a witness for the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Glasby): Are you any relation to the plaintiff in this action?

A. I am his wife.

Q. When were you married?

A. In April of 1929.

(Testimony of Leona Nitey.)

Q. Do you have any children?

A. Three boys.

Q. And what is the age of those boys?

A. The oldest one is 23, the second one is 18 and the little one is 12.

Q. Do you keep any records for the family?

A. I try to do the best I can at that.

Q. Have you kept any record of Jim's work?

A. Yes, sir.

Q. Do you keep a record of the money you have on hand?

A. I did when we had some money.

Q. Do you have any money now?

A. No, sir. [84]

Q. How are you surviving?

A. Well, our 18 year old boy is working now.

Q. And that is the way you are getting by?

A. Yes, sir.

Q. Do you have those records in court with you?

Mr. Sharp: I assume that this has something to do with the loss of earnings, and how the family is living, otherwise, of course, I don't think it would be material in any manner, that is, as to how the family is living I don't believe is material in this matter at all. If there are certain records that are brought in, of course, we will have to meet that when the records come.

The Court: Yes, I will instruct the jury at this time. You are to disregard any testimony of this witness in regard to not having any money or things of that kind. It is immaterial here. I know

(Testimony of Leona Nitcy.)

that it is a serious thing for a person not to have any money but this case, of course, has to be tried on the evidence and not on a matter of sympathy or any condition that she might be in or the family might be in. Of course, you may show his earnings and so forth. You may proceed.

Q. Do you have a record of his earnings in the courtroom here?

A. Well, yes, I do, while he was working. [85]

The Court: I am wondering if we couldn't save a great deal of time if we would take a short recess at this time and counsel get together on these figures and then perhaps stipulate as to the earnings.

Mr. Sharp: We will be glad to do that, your Honor.

Mr. Glasby: Yes, I think we can.

The Court: It will save a lot of time and we will take a five minute recess at this time.

October 26, 1953, 3:00 p.m.

Mr. Glasby: Counsel has stipulated that the man's wages, Mr. Nitcy's wages, were approximately \$230.00 per month while he was working for the Milwaukee. That would largely be the purpose of this witness testifying, except that I would like to have the right to call her in rebuttal if I find it necessary.

The Court: Yes, of course, you may do that.

DR. BERGAN RAFF

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Glasby): What is your occupation?

A. Physician.

Mr. Sharp: We will admit the Doctor's qualifications.

Mr. Glasby: Thank you.

Q. Are you acquainted with Mr. Nitey?

A. Yes, I am.

Q. When was the first time that you ever treated him?

A. It was during 1948, when he was employed by the St. Maries Lumber Company.

Q. And what did you treat him for?

A. Oh, various respiratory infections, as I recall he received shots for cold.

Q. And when was the next time?

A. That was on October 24, 1950, at which time he was working at the roundhouse of the Milwaukee Railroad.

Q. And you didn't see him between 1948 and 1950?

A. Yes, I did, I saw him in 1949 but I believe that was also on these other matters, while he was with the Lumber Company. This is the first notation I have when he was employed by the Milwaukee.

Q. And you didn't see him until October, 1950?

A. That is right.

(Testimony of Dr. Bergan Raff.)

Q. Dr. Raff, did you ever take any X-ray of this man? A. Yes, I did.

Q. Do you have those with you?

A. Yes, I took one view of the pelvis. [87]

Q. Will you tell me what date that was taken, please?

A. This was on February 14, 1950.

Q. Did I understand then, Doctor, that you did not treat him between '49 and October, 1950?

A. Well, the first notation on the chart is October 24, 1950.

Q. But the X-ray shows that it was taken on February of 1950? A. That's right.

Q. And you don't recall treating him in February of 1950? A. Yes, I do.

Q. Then the other statement was wrong?

A. Well, I have a notation here, October 24, 1950, sciatica.

Q. And what is sciatica?

A. Well, that was pain in the leg and the back and in this case it was going down his left leg.

Q. And what date was that you spoke of?

A. October 24, 1950.

Q. Do you know for what purpose the X-ray was taken that you spoke of?

A. Well, he saw me in February for this same matter, with the back pain.

Q. And what treatment did you give him?

A. He received some injections of a substance called procystine, that was before the era of corti-

(Testimony of Dr. Bergan Raff.)

zone, and he also received [88] some diathermy treatment.

Q. That is heat treatment, is it? A. Yes.

Q. And what was the purpose of these shots, Doctor?

A. The X-ray showed a bony spur on the vertebra which I presumed to be due to arthritis,—which is due to arthritis.

Q. And that was treatment for that condition?

A. Yes, that is right.

Q. And was that the only treatment that you gave him? A. Yes.

Q. What does your X-ray show, Doctor?

A. As I mentioned, it showed a normal pelvis and vertebra except for one vertebra which had a small spur, a small sharp spur, and as far as spurs go I would say it was a very mild inflammation.

Q. And that is the only evidence that you discovered?

A. Yes, I will say, however, this is just an anterior posterior view, a lateral view wasn't taken because I didn't feel that it was indicated at that time.

Q. And did you treat him constantly from February on?

A. Several times, I don't recall how often in March, however, I saw him a year later, in October of 1951, also in July of 1951 he came in and wished to be referred to Dr. Peacock, another physician employed by the Milwaukee [89] Hospital Associa-

(Testimony of Dr. Bergan Raff.)

tion. I did not treat him then, I just gave him a referral slip.

Q. And what was his complaint in 1950?

A. Back pain.

Q. And did he give you a history of the cause of it?

A. At that time he didn't. I wrote a letter about a year later in which I stated that no history was given me at the time of the initial visit. As a matter of fact we always make an injury report for the Railroad Company and none was made in Jim's case.

Q. You didn't make one? A. No.

Q. Did he tell you that he had been injured?

A. No, he did not.

Q. Did you know that he was working on the railroad? A. Yes, I did.

Q. Did you have any position with the railroad?

A. Yes, I was district surgeon at that time, and the other doctor with me was the local surgeon.

Q. At what time was that?

A. February, 1950.

Q. You were district surgeon at that time?

A. Yes, sir.

Q. How long did you remain as district surgeon?

A. About two years, I had been local surgeon since 1947.

Q. Until when? [90]

A. I cannot tell exactly the dates,—I will take

(Testimony of Dr. Bergan Raff.)

that back, I didn't become district surgeon until April of 1950.

Q. And who was the district surgeon?

A. At that time it would have been Dr. Mosley.

Q. Now, in your job there with the railroad, were you hired to treat employees of the Milwaukee? A. Yes.

Q. And who was to pay for this?

A. The Milwaukee Hospital Association paid us a salary each month, a fixed amount, and that took care of all our professional work.

Q. Did you also charge the patient in addition to that? A. No, we did not.

Q. Did you charge Mr. Nitcy?

A. I did not.

Q. And you didn't charge him at any time?

A. That is right.

Q. In February or October?

A. No, sir, I did not. As a matter of fact, when he was working for the St. Maries Lumber Company he was also under a hospital contract and he was not charged at that time except his monthly dues of a dollar and fifty cents.

Q. And in February of 1950 nor at any time after that did he pay you any fee? [91]

A. That is right.

Q. And you were treating him as a Milwaukee patient? A. That is right.

Q. Did he have any evidence of injury in February of 1950?

A. No, sir, he did not.

(Testimony of Dr. Bergan Raff.)

Q. Did he tell you that he was injured?

A. No, there was no history of any injury at that time.

Q. What did he say was the matter with his back?

A. That it just came on while he was working.

Q. Then you knew that this trouble arose while he was working? A. Yes.

Q. Now, Doctor, was there any duty on your part to report these injuries or illness that arose while these workmen were on the job working?

A. No, there has to be a specific incident. A man could have a coronary thrombosis on the job and that would not be a reportable condition.

Q. And what does that have to do with this condition? A. Nothing.

Q. That has to do with a heart condition?

A. That is right, I just used that as an example.

Q. If a man dropped dead of heart trouble on the job then you would not have to report that to the Milwaukee?

A. Not as an injury, that is right.

Q. Did you have to report it at all? [92]

A. Yes, we have a monthly report where we report all sickness and injury.

Q. And did you report that as to Mr. Nitcy's condition?

A. Yes, he is on the monthly report.

Q. And for what period?

A. I cannot say without looking at the report

(Testimony of Dr. Bergan Raff.)

but I am sure it must be for the months that we are talking about.

Q. Where are those copies?

A. I believe that they are over there at that table (indicating).

Q. Dr. Raff, did I understand you to say that in February he complained of back trouble?

A. Yes.

Q. As I understand it, Doctor, these are the records that you send in? A. Yes.

Q. Will you look at that and tell us, if you please, what you diagnosed the trouble as at that time?

A. Apparently he was suffering from a cold at that time.

Q. You say he complained of his back. Is there any connection between a cold and a back pain?

A. No, there isn't.

Q. What treatment did you give Mr. Nitcy?

A. For the back trouble? [93]

Q. For anything?

A. He has had those injections that I told you about for his back.

Q. Is that vitamins?

A. No, those are non-specific proteins, a sulphur compound.

Q. Does that have any pain killing qualities?

A. No.

Q. And diathermy, that is a heat treatment?

A. Yes.

Mr. Glasby: I think that is all.

(Testimony of Dr. Bergan Raff.)

Cross Examination

Q. (By Mr. Sharp): Doctor Raff, you have stated that you were district surgeon for the Milwaukee Hospital Association in 1949 and 1950?

A. Yes, but I believe that it was of April 1st of 1950.

Q. Doctor, will you tell me about this association,—supposing that an employee has a cold or neuralgia or some other such condition, does the Milwaukee Hospital Association take care of that?

A. Yes, sir.

Q. And is that free of charge?

A. Yes, it is, except for the monthly dues.

Q. Is it a contract arrangement between the Milwaukee Railroad and the Hospital Association, is that the way [94] it works?

A. Yes sir, that's right.

Q. And it is set up for the benefit of the employees?

A. Yes, sir.

Q. And the men make certain contributions, do they?

A. Yes.

Q. Out of their monthly checks?

A. Yes.

Q. And they know when they receive their checks that they are making this contribution?

A. Yes.

Q. And you treat those people, the employees, not only for industrial cases, but for any condition, is that true?

A. That is true.

Q. If a man is working in the St. Maries round-house and he wants to be treated, what does he do?

(Testimony of Dr. Bergan Raff.)

A. The usual procedure is to go to the supervisor, in that case it would be his foreman, and obtain a hospital slip, that is a green slip and it is signed by the foreman and the man presents it at the hospital and his name is registered in a separate book at the office of the hospital, separate from the private patients. We do that because there are no charges made for these patients and we keep that to make up these monthly reports.

Q. You say that book is kept to make out these monthly reports? [95] A. That is right.

Q. Is that one of the reports that you were talking about? A. Yes.

Q. The one you have there? A. Yes.

Q. What month is that?

A. This is for December, 1949.

Q. Does that report show that Mr. Nitey availed himself of the Milwaukee Association,—the Hospital Association?

A. Yes, on the 28th of December, and the diagnosis is bronchitis, it shows he had one office call.

Q. And that was December, '49?

A. Correct.

Q. Now, Doctor, will you tell us what that report is which you have?

A. This is February, 1950.

Q. And does Mr. Nitey appear on that report?

A. Yes, he was in once for a cold.

Q. I think that on direct examination you mentioned that there was an X-ray taken of the back of this man in February of 1950 and yet on that

(Testimony of Dr. Bergan Raff.)

form it says a cold. Does that mean that a man might come up for a cold and also complain of something else while he was there?

A. It is possible, yes.

Q. If a man came in and if he had three or four complaints, [96] would you put all three or four of them down?

A. Usually, however, these diagnosis are picked up by the office girl from the book and she may have asked what he had or something like that and she may have just jotted the one down.

Q. So that when a man comes in he tells what is the matter and the nurse puts that down in the book and then the book is used to make the report, is that right? A. That is right.

Q. And it says cold on that one? A. Yes.

Q. And that means that the man was complaining of having a cold?

A. That's right, there must have been some reason for that, of course, it is possible that we may have missed him during that month but I don't think so. This was taken, that is the X-ray, on the 14th of February.

Q. Did you take any other X-ray on that date?

A. No, this is another X-ray taken on the 16th of March, 1951.

Q. That one that you had out there, you mentioned on there or noted on there, I believe, arthritic spur? A. That's right.

Q. Perhaps, Doctor, you could show the jury

(Testimony of Dr. Bergan Raff.)

that condition, that arthritic condition you mentioned?

Mr. Glasby: May I look at that? [97]

The Court: I thought you had him testify from this exhibit, didn't you look at it?

Mr. Glasby: No, sir, I did not.

The Court: Then we will take time, you may always look at the exhibits.

A. This is a normal outline of a vertebral body, there are many of these bodies in the spine. In a normal vertebra this has a rounded edge, down here on the fifth vertebra you can see a sharp point, that is the spur. In this entire vertebra or this view of the vertebra that was the only pathology that I could see, however, I am not an X-ray man but to my knowledge I would call that a normal X-ray except for that bony spur. As I said before, that is what we would call a minimal involvement in a moderate or severe case, every corner would show a sharp spur and sometimes a bony growth across here (indicating). Another sign of arthritis, here (indicating) in the sacroiliac joint, where the hip bone joins the spine or hooks on to the spine and if they are infected with arthritis they sometimes fuse across here and you would see a white line instead of a dark space. I would say this shows up as a normal joint.

Q. That arthritic condition which you spoke of, would that spur grow on there in a period of four days?

A. No, certainly not. That would be a pre-exist-

(Testimony of Dr. Bergan Raff.)

ing thing, [98] I would say, for at least a year, it would be hard to judge that.

Q. Is that type of thing fairly common?

A. These are often found in other X-ray examinations, we will find these spurs quite frequently if we take an X-ray for a stomach or chest ailment or examination we may find the spine loaded with these spurs and the patient has no complaints to make, they are often co-incidental.

Q. Did you bring this to the attention to Mr. Nitcy?

A. I told him that he had arthritis and that was the purpose of the shots and the heat treatment.

Q. Did he know that he had arthritis, did he mention that to you?

A. Well, yes, a year later when he came back he said that everyone else had told him the same thing. He told me that he had seen several chiropractors and in fact that he had had a complete work up by Dr. Langer in Spokane.

Q. Then when he was in to see you, on February 14, he did not complain of any injury to his back?

A. No, that is right.

Q. There is something I think should be cleared up, Doctor, I believe you in answer to questions by Mr. Glasby said that you knew the condition came on while he was working, do you mean that just in the same way that a cold might [99] come on while a person was working, I believe you mentioned coronary thrombosis or something?

A. Yes, that is right, he gave no history of any

(Testimony of Dr. Bergan Raff.)

definite injury but that it came on while he was doing his normal job.

Q. And you reported it in the monthly report, is that right? A. That's right.

Q. You mentioned December, 1949, will you look at May of 1950,—I will just give you all of these reports and will you just go through these months and tell us the nature of any injuries during that time?

A. You mean to Mr. Nitcy or all injuries?

Q. Yes, to Mr. Nitcy?

A. February of 1950, that is the one I had, where I diagnosed it as a cold. June of 1950, cold again. May of 1950, upper respiratory infection, another cold. October of 1950, a diagnosis of lumbago, that is a back complaint.

Q. Now, October of 1950, that is the first time that this back shows up in this man's report, or his medical slips,—lumbago, what does that mean, Doctor?

A. Actually, it is a painful back due to muscle spasm. It is a very poor term, it is not specific, it can be caused by chilling of the muscle itself, we have heard of people mention cold in the back and it can be caused by [100] arthritis, when these spurs cause a pressure on the nerve and throws the muscle into spasm, and there are other causes too.

Q. And would you, from looking at these reports, Doctor, would you say the man did not complain through October of 1950 of any injuries?

(Testimony of Dr. Bergan Raff.)

A. That is true.

Q. And he did not pay his own way, he was taken care of by the railroad and by the Milwaukee Hospital Association?

A. That is correct.

Q. And he has a history from December of '49 of using the facilities of the Milwaukee Hospital Association?

A. Yes, sir.

Q. You mentioned diagnosis, now then, Doctor, by diagnosis you mean that is what the men tell the nurse when they come in with a slip. Would you just go over the report and list in one month, just list the diagnosis given there for six or seven men so that we can see how carefully it was taken care of there?

Mr. Glasby: I cannot see where that has anything to do with this case.

The Court: I think that is true, but we have had so much here that has nothing to do with this case that I think now we might as well get it all.

Q. What month do you have before you, Doctor? [101]

A. I have October of 1950.

Q. And there is a column on there that says nature of illness or sickness?

A. That is correct.

Q. Will you tell us what that shows?

A. The first one is fractured ribs, the next is injury to the left flank, that is a very non technical diagnosis. The next is hypertension, sinusitis, bruised finger, gall bladder, sinus infection—

Q. —I think that is sufficient, Doctor.

(Testimony of Dr. Bergan Raff.)

A. Very well.

Q. Doctor, did you testify that if a man comes in and complains of an accident or injury on the job that a report is made of that?

A. Yes, sir.

Q. A special report? A. Yes, sir.

Q. A different kind of report?

A. Yes, an injury report, I cannot tell you the number of it now but it is a green sheet.

Q. And you have searched your records, have you, for this?

A. Yes, I don't believe that we have any for Mr. Nitey.

Q. In 1950 when you first talked to Mr. Nitey about this cold condition and some mention was made of his back, and also you took an X-ray, did he seem aware of the fact that he [102] had a back condition?

A. Yes, he knew that he was having back trouble.

Q. Did he give you any history or any record of having gone to chiropractors and so on for that condition?

A. He didn't mention who but he did mention several chiropractors and he also did mention by name Dr. Langer of Spokane.

Q. That was in February? A. Yes, sir.

Mr. Glasby: I want to interpose this further objection, I would like to know when these things all happened.

(Testimony of Dr. Bergan Raff.)

The Court: I think he said that this was in February.

A. In February of 1950 and I believe that the mention of Dr. Langer was in July of 1951.

Q. That was later?

A. Yes, sir, and he also mentioned this referral to Dr. Peacock.

Q. This Dr. Langer, is he an M. D.?

A. He is a neuro surgeon. He did certain X-ray studies where they inject dye into the spinal canal to determine whether or not there are displaced discs, any ruptured discs. Those are small cushions between the vertebra and sometimes they come out of position and cause pain, back aches and leg [103] pains, however those studies were negative.

Q. As I understand it, you referred him to Dr. Peacock? A. That's right.

Q. And he is also an Association doctor?

A. Yes, sir.

Q. And did you also refer him to Dr. Dupree?

A. Yes,—I think that Dr. Peacock made the arrangement with Dr. Dupree.

Q. And that is all at the railroad expense?

A. Yes, sir.

Mr. Sharp: I think that is all, Doctor Raff, thank you.

Redirect Examination

Q. (By Mr. Glasby): Would this spur that you mentioned disable the man?

A. If it was in the right location it could give

(Testimony of Dr. Bergan Raff.)

trouble, it might cause some leg pain but I would not say it would be completely disabling.

Mr. Glasby: I would like to have those X-rays entered in evidence.

The Court: They may be marked and admitted.

Mr. Glasby: Nothing further.

Mr. Sharp: I have nothing more. [104]

THOMAS MOUTRAY

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Glasby): Are you acquainted with the plaintiff, Jim Nitey?

A. Yes, he worked with me lots of times.

Q. Do you remember when he worked on the railroad? A. Yes, sir.

Q. Did he work on the railroad just one time?

A. Two times. He quit once and Mr. Stranberg took him back, he was a good worker, he said he was one of the best men he had to do this cleaning.

Q. And you say that was the second time then?

A. Yes, the second time.

Q. How long did you work on the railroad?

A. Oh, 23 or 25 years.

Q. 25 years?

A. 23 or 25 and part of that time was for the government.

Q. Have you ever worked for any other company besides the Milwaukee?

(Testimony of Thomas Moutray.)

A. Yes, the Great Northern, the Northern Pacific, the Union Pacific and the Milwaukee and also on a government railroad in Alaska.

Q. What kind of work did you do? [105]

A. Machinist.

Q. In the roundhouse and shop?

A. In the back shop or anywhere.

Q. Did you have to work up high on engines?

A. Yes, lots of times.

Q. In other shops how was that work done?

Mr. Sharp: If he is going to testify about work done in some other shop or some distant shop than this, he would have to lay a foundation as to the type of shop, the size of the engines and what kind of work he did. We object to this as immaterial, incompetent and irrelevant.

The Court: The objection is sustained.

Q. Are you familiar with what is called a C class engine? A. Yes, the 1200 type.

Q. Have you worked on engines similar to the class C that the Milwaukee has?

A. Yes, sir, I have worked on them.

Q. And did you say you had worked in roundhouses?

A. Yes, sir, and in back shops, too.

Q. Have you worked in roundhouses similar to the roundhouse in St. Maries?

A. Yes, sir, I worked at Wenatchee, Washington, and it is similar to that.

Q. Are you familiar with the St. Maries roundhouse? [106]

(Testimony of Thomas Moutray.)

A. I know the St. Maries roundhouse, I worked there.

Q. I see, you worked there?

A. Yes, for eight years.

Q. And these other roundhouses that you mentioned, did you have occasion to work high and on C type engines?

A. Yes, sometimes on top of the bell ringer, sometimes you have to go up and tighten about the smoke stack on some engines.

Q. And what equipment would you use when you worked high on those engines?

A. Well, they go about just like a painter and put a scaffold up for you to get up there with, down there we had a hard time even packing a pump, you have to use a ladder.

Q. Where is that?

A. That is at St. Maries.

Q. You don't have the equipment at St. Maries, is that right?

Mr. Sharp: If the Court please, I don't think that the proper foundation has been laid for this sort of questioning, this man has testified about packing pumps, and so on, and they are different kinds of work at different places and I object to this as being immaterial to the issues here and I don't think any foundation has been properly laid. I also think this sort of examination is misleading.

The Court: Of course, the work involved here was at the roundhouse at St. Maries and done under the conditions as they existed there. I don't think

(Testimony of Thomas Moutray.)

that the foundation has been properly laid for such examination as you are conducting.

Q. Did I understand you to say that you have worked for other companies in roundhouses and shops that are in the same status as the St. Maries roundhouse?

A. I worked for the Great Northern in a similar roundhouse, they run out to Oroville and another branch to Waterville out of Wenatchee and, of course, we would get the main liners there too if something went wrong with them and I worked on them,—it was just about the same thing. There were some tools down there that I had to buy for myself because they didn't have them.

Mr. Sharp: I am sorry, Mr. Glasby, I don't like to interrupt you too much but I must keep this record straight and clear. I wonder if my same objection could go to this testimony. This testimony now goes to work on the Great Northern and about a roundhouse and this place or that place and that seems to be the only foundation laid here.

Mr. Glasby: It has also been brought out, your Honor, that he worked on similar engines and [108] in roundhouses and shops that were similar.

The Court: But, Mr. Glasby, your own witness has testified that the conditions at the St. Maries roundhouse were different, that they didn't require and in fact that they would not justify the putting up of a scaffold.

Mr. Glasby: Of course, I want to bring out the

(Testimony of Thomas Moutray.)

facts that these matters,—these things should have been supplied. I have alleged that they didn't supply this man with the proper equipment.

The Court: Just in order to shorten this matter up I will permit you to ask this man whether or not in his opinion proper equipment was furnished and used at the St. Maries roundhouse.

Q. Mr. Moutray, in your opinion, was proper equipment supplied and furnished for working high on engines at the St. Maries roundhouse?

A. In some places it was all right, you could get at them, and again in some places it wasn't.

Q. Did they have proper equipment to get at it at St. Maries?

A. Well, I will tell you, some people,—let me say I had a helper and when it came to five days a week,—

Q. —That does not answer my question, Mr. Moutray, I just want to find out if they supplied proper equipment for [109] working high on engines at St. Maries, at the St. Maries Milwaukee roundhouse?

A. No. I tell you, one time I was there and a pipe burst—

The Court: —In view of the objection heretofore made I will have to sustain it here, this testimony is entirely immaterial. After all, this record might be reviewed by a higher court and I don't want to seem too ridiculous.

Mr. Sharp: I was about to renew my objection but I presume that is not necessary.

(Testimony of Thomas Moutray.)

The Court: No, I thought I should stop this myself.

Q. Now, I will ask you to answer this question yes or no. Do you think that the equipment at the roundhouse at St. Maries was proper equipment for working high on engines?

A. I don't think so.

Q. You don't think so? A. No.

Mr. Glasby: That is all, you may examine.

Cross Examination

Mr. Sharp: Before I start any examination I would like to ask that the answer be [110] stricken to that last question. I don't believe it is material and I don't believe there is any qualification shown and there was no foundation laid for such a question.

The Court: The answer may be stricken.

Mr. Sharp: Then I have no questions.

HERBERT MARQUETTE

being called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Glasby): Are you acquainted with the plaintiff, Mr. Nitcy?

A. I have worked with him.

Q. Have you worked on the Milwaukee Railroad? A. Yes, sir.

Q. Where did you work? A. St. Maries.

(Testimony of Herbert Marquette.)

Q. For how long a time?

A. Eight years and a half.

Q. Did you know Mr. Nitcy during that time?

A. He was my helper.

Q. What was he doing?

A. Servicing engines, greasing them, wiping them, cleaning them up, putting water and oil in them.

Q. Did you know Mr. Nitcy prior to February 10, 1950? [111]

A. Yes, sir.

Q. What was the quality of his work?

A. His work was number one.

Q. Did you know him after February 10, 1950?

A. Yes.

Q. Did you observe his work after that time?

A. He never worked after that time with me.

Q. Did you see him working at the roundhouse after that time?

A. In 1950, you mean?

Q. Yes.

A. Yes, sir, we used to meet in the morning when he worked there.

Q. Do you know whether he was able to handle all of the heavy work around there after February 10, 1950?

Mr. Sharp: I wonder if this man has testified that he worked there after that date.

The Court: All he has testified to was that Mr. Nitcy did not work with him after that date.

A. No, he wasn't there with me, he worked there all right but he didn't work with me, he worked nights a part of the time and I worked days.

(Testimony of Herbert Marquette.)

Mr. Sharp: Then I move to strike the answer. Certainly this man is not qualified to answer that question. [112]

The Court: It may be stricken.

Mr. Glasby: No further questions.

Mr. Sharp: No questions.

ROBERT E. GRANVILL

being called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Glasby): Have you ever worked at the St. Maries roundhouse? A. Yes, sir.

Q. Are you acquainted with Mr. Nitcy, the plaintiff here? A. Yes, sir.

Q. How long have you known him?

A. About three years, I knew him ever since he came to work there.

Q. Do you know whether he was ever injured while working there?

A. Well, I don't know, I never saw him injured, —I heard that he was.

Mr. Sharp: I must ask to strike that answer——

The Court: ——Yes, the last part of the answer may be stricken "I heard that he was".

Q. Did you ever have a conversation with Mr. Nitcy in the year 1950? [113]

A. Yes, if he worked there I did because he worked with me.

(Testimony of Robert E. Granvill.)

Q. Did he ever discuss anything about injuries at that time?

Mr. Sharp: Once again, if the Court please, I must object to this because——

The Court: ——Yes, that objection will be sustained. It would be entirely self serving.

Q. Are you acquainted with Harry Bogardis?

A. Yes, sir.

Q. Were you acquainted with him in 1950?

A. Yes, sir.

Q. Where was he working then?

A. He was stationary fireman in the round-house at St. Maries.

Q. Have you worked with him or for him?

A. Yes.

Q. Is he the type of man that was willing to help his fellow servants?

Mr. Sharp: Now, I must object again, this is so evident that it is immaterial. Here he is inquiring about another employee entirely——

The Court: ——Yes, I don't want to get involved in the trial of any other party here, let's get through with this one. The objection to that will be sustained.

Mr. Glasby: That will be all.

Mr. Sharp: I have no questions. [114]

The Court: Now, Mr. Glasby, you have only one other witness, I believe, and that is the Doctor.

Mr. Glasby: That is right.

The Court: Can you have your doctor here at 10 o'clock tomorrow morning?

Mr. Glasby: I feel sure that I can.

The Court: We will recess at this time until 10:00 o'clock tomorrow morning.

October 27, 1953, 10:00 a.m.

Mr. Glasby: If the Court please, counsel for the railroad company and I have agreed to stipulate that this man was born in November, 1897, making him one month short of 54 years of age on October 1st, 1951. Presently he would be 56 and would turn 57 his next birthday.

The Court: Have you figured out what the life expectancy is?

Mr. Glasby: I am unable to get a stipulation on that. We tentatively agreed for a stipulation on it but I do have the Idaho code here.

The Court: What does it figure out according to the Idaho code?

Mr. Glasby: Under the American annuitance, of age 53, it would be under the ultimate, 19.8 and under [115] the select it would be 20.26. At the age of 54 it would be 19.29 under the ultimate and 19.58 under the select. Under the standard annuity table at the age of 53 it would give him a life expectancy of 22.45 years and at the age of 54 he would have a life expectancy of 21.75.

Mr. Sharp: My position in refusing to stipulate on those figures is on the basis of what has gone in I figure it is not pertinent. I have heard nothing to the effect that the man is permanently disabled, there is nothing in this record concerning perma-

ment disability. It seems to me that this would be misleading.

The Court: I will take this under consideration and will rule on this matter before I instruct the jury, however, you have stipulated as to his age.

Mr. Sharp: I think that is right.

Mr. Glasby: It seems that I am having doctor trouble, I thought that Dr. Miller would be here and perhaps he had gone to the County Court House but I called there and he has not been there. I understood from Spokane that he would be here at 10 this morning. My case is all in with the exception of Dr. Miller. I thought perhaps we could rest with the permission of the Court to put Dr. Miller on when he does get here [116] and let the defendant go ahead with its case at this time.

The Court: I think that I will let the jury retire for a few minutes.

(The following proceedings had in the absence of the jury.)

The Court: It would be somewhat of an irregular procedure but it has occurred to me that no doubt the defendant had a motion to make at the time you rested and if your case is rested now, that is, with the exception of this one doctor's testimony, we might go into the question involved here in connection with the motion to strike which I left open by my other ruling as to certain matters in the complaint and I thought that we might dispose of that, that is, I may only hear the argument on it but we could go that far. We can save some

time, I am sure. Do you understand what I mean?

Mr. Glasby: Yes, I do.

Mr. Sharp: Yes, your Honor, and I want to renew my motion and I could argue that. I also want to make a motion at the close of the plaintiff's case for dismissal or an instructed verdict.

The Court: Of course, I want to handle this correctly, it would not do to allow the [117] plaintiff to try and correct something that may come up in the argument by calling other witnesses and I would want that understood.

Mr. Sharp: If it please the Court, I do hesitate to make my motion before the plaintiff has rested.

The Court: Yes, I understand, we will wait. I just thought we might save a little time. I dislike very much to have delays like this one, we have juries here and trying cases of this kind are expensive and I dislike to have these delays.

Mr. Sharp: As to my motion to strike I really don't have anything more than I had in my brief.

The Court: That is all right, I understood that you wanted to renew that motion.

Mr. Sharp: Yes, I should like the record to show that that motion is renewed.

The Court: I will consider that.

Mr. Sharp: That motion is as to Sections 1 to 50 of the Safety Appliance and Boiler Inspection Acts.

The Court: If there is any doubt in the record now this motion may be considered renewed at this time. What do you have to say about it? [118]

Mr. Glasby: I am unable to supply the Court

with any authorities on my position concerning this Act.

The Court: I am sure from the investigation that I have made that the motion should be granted and it will be granted as to that section of the Statute. This eliminates all matters in this complaint except the first count. Whether it comes within the Statute or not there is no evidence to support any allegation of the complaint except the first three and I expect to hear from you later with respect to them and with respect to that phase of the case. Number 1, 2 and 3 alleged in Paragraph 4 of the complaint is all that is left of the complaint at this time.

In the interest of time and in order to save any further delay the defendant has stipulated with the plaintiff that if Dr. Richard C. Miller was here on the witness stand he would testify to the fact that he had reviewed the record of September, 1949, and that there was no evidence of anything wrong with plaintiff's spine at that time. There was no charge for this information, that is what the doctor,—Dr. Miller wrote Mr. Nitcy. The defendant is only admitting that the doctor would testify to that if [119] he was present and he is not making any admission as to the truth of the statement. The letter may be marked and admitted. Is there anything further, Mr. Glasby?

Mr. Glasby: The plaintiff rests.

Mr. Sharp: At this time I would like to renew my motion to dismiss.

The Court: I am going to excuse the jury until

1:00 o'clock this afternoon. I used language that was a little broad in making my ruling on the motion to strike. I only intended to strike those acts charged against the defendant in Paragraphs 5, 6 and 7 and not, of course, strike the allegations of 8 and 9. It sounded as if I had eliminated the entire complaint. I will hear your motion now.

Mr. Sharp: My motion, of course, is a renewal of the motion to dismiss and that the plaintiff be nonsuited with prejudice and also a motion that the jury be instructed to bring in a verdict for the defendant and against the plaintiff. Without rehashing the testimony that has gone in so far and with the matters stricken from the complaint by the Court we have only the barrel episode,—

The Court: —I think, at this time, gentlemen, that I will add to the portions eliminated from this complaint, Items 1, 2 and 3, so the only matter [120] now that is left in the complaint is the failure to keep the drum in an upright position. I don't feel that there is any evidence at all that soft surface there had anything to do with the matter as to the failing to provide solid footing. The plaintiff testified that he had solid footing and that he did not slip so that it comes down to the one question as to the negligence of the co-worker in the handling of the barrel.

(Remarks of counsel and Court reported not transcribed.)

The Court: I will deny the motion at this time and the matter will be limited to the handling of the barrel. Other matters have been eliminated

from this case, that will give you an opportunity to shorten your case a good deal. The Court will be in recess at this time until one o'clock.

October 27, 1953, 1:00 p.m.

The Court: Ladies and gentlemen of the jury, I think I should tell you at this time there is only one question in this case now, and that is whether or not one Harry Bogardis negligently handled the barrel of oil in question in failing to keep that barrel or drum of oil in an upright position. All other questions have been eliminated from the evidence that has been introduced before you [121] so far. There will be only one question submitted to you for your decision and that is whether or not the employee of the railroad company, Harry Bogardis, was guilty of negligence in failing to keep the drum or barrel of oil in an upright position. You may call your first witness.

HARRY BOGARDIS

being called as a witness by the defendant, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Sharp): Mr. Bogardis, are you an employee of the Milwaukee Railroad?

A. Yes, sir.

Q. And you have been for how long?

A. 31 years.

Q. How much of that time have you worked in the St. Maries roundhouse?

(Testimony of Harry Bogardis.)

A. I have been working there since 1928.

Q. Since '28?

A. Except four years that I was firing on the road.

Q. Were you working there in 1949 and 1950?

A. Yes.

Q. And what is your particular job there? [122]

A. Stationary fireman.

Q. In about 1950 approximately how many men were working on your shift in this roundhouse?

A. I would say four men in 1950.

Q. Was there usually one laborer in that group of four? A. Yes.

Q. What kind of work does a laborer usually do in a small roundhouse like that?

A. Well, clean the pits, clean the engines and any other necessary work around there.

Q. Would it be a fair statement to say that he is an assistant to various men there?

A. Yes.

Q. In a small roundhouse like that do the men pretty well cooperate with each other on duties?

A. Yes, sir.

Q. As I understand it, one of the requirements of the roundhouse like that is that the workmen put up barrels of wash oil, is that right?

A. Yes, sir.

Q. And what does that job entail, that is, to get a barrel of wash oil ready for use?

A. We go and get a truck and then we get the barrel of oil on this truck, there is a hoop on it

(Testimony of Harry Bogardis.)

that we throw over the barrel when we pick the barrel up and then we go and [123] unload it.

Q. By truck do you mean a two-wheeled truck, a hand truck? A. Yes.

Q. The hoop that you mentioned, is that connected with the truck in some way?

A. Yes, connected with the truck, both handles.

Q. Is it a two man or one man job to move this barrel of oil from one place to another?

A. It is a two man job.

Q. How did the two men work together on that job?

A. Well, one man pulled the truck and the other helped usually with the handles or with the rope, that is the way he usually helps.

Q. How far does that barrel have to be moved before it is set up?

A. I should say probably a hundred feet.

Q. Have you put up a lot of those barrels in your time? A. Lots of them.

Q. Did you put up a lot of those barrels before February of 1950? A. Yes, sir.

Q. And are you still putting up those barrels?

A. Yes, sir.

Q. Turning your attention to February of 1950, do you recall an incident of putting up one of those barrels with Mr. Nitey? [124]

A. I wouldn't say the date exactly, it might have been sometime in there about that time.

Q. I am talking about one specific incident now, can you recall or can't you recall any unusual in-

(Testimony of Harry Bogardis.)

eident? A. No, I don't think I can.

Q. Then is your answer that you may or that you may not have put up a barrel in 1950, in February, 1950, with Mr. Nitcy?

A. Well, it could be.

Q. How often do those barrels have to be put up?

A. Well, it just depends on how much we use, it may be two weeks and it may be once a week.

Q. Now, I will ask you again, do you recall any one particular incident around February of 1950 where you put up a barrel with Mr. Nitcy?

A. No, I can't.

Q. Has he worked with you on that job at other times? A. Yes.

Q. Has he worked with you on that job as long as he has been with you?

A. I guess so, yes.

Q. I will ask you if in February of 1950 you can recall any incident when you were wheeling a barrel of oil in and dumped it over on its side?

A. No, I don't. [125]

Q. Ordinarily how does a barrel end up when it is brought in that way?

A. Well, we just tip the truck up and set it up.

Q. You set it up on end, is that right?

A. Yes.

Q. And what about the strap or hoop?

A. We take the strap off after it is set up.

Q. Then turning your attention to February,

(Testimony of Harry Bogardis.)

1950, can you recall when you pushed one on its side or let one drop on the side?

A. No, I don't.

Q. Can you recall any incident, in doing that work, where the barrel ended up on its side?

A. No, I don't, I can't remember.

Q. Can you recall in February of 1950 a situation where a couple of—

Mr. Glasby: —I will object to that on the ground it is leading, all of these questions have been leading, he is trying to suggest the answer.

The Court: He has not finished his question yet, I cannot tell whether it is leading or not. Go ahead.

Q. Can you recall in the year 1950 when you were working with Mr. Nitey, any special occasion when he complained that he hurt his back? [126]

A. No.

Q. You have already stated that you cannot recall any situation where a barrel ended up on its side, is that right?

A. That is right.

Q. Then I take it that you cannot recall any situation where you had to lift one end and had it half way up and dropped it back on the ground, is that correct?

A. No, sir, I don't recall anything like that.

Q. If an incident had happened in 1950 at which Mr. Nitey had complained of hurting his back, would you recall that?

A. I would.

Q. You would recall that?

A. I would recall it, yes.

(Testimony of Harry Bogardis.)

Q. And no such incident occurred, is that correct?

A. Not to my knowledge, no, it did not occur.

Q. Can you recall an incident of working with him, putting up a barrel and where he laid off because of a bad back, or his telling you that he had a bad back?

A. No, he didn't tell me that.

Mr. Glasby: We object to that as hearsay.

The Court: He has answered the question.

Q. Did Mr. Nitey ever complain to you while you were working [127] with him on the job, that he had hurt his back? A. No.

Mr. Glasby: We make the same objection.

The Court: The answer may stand.

Q. Your answer to that question was no?

A. That's right, my answer was no.

Q. When did you first hear about any alleged injury occurring to Mr. Nitey?

Mr. Glasby: We object to that.

The Court: On what grounds do you base your objection?

Mr. Glasby: On the ground that it is hearsay.

The Court: He is not asking what he heard, he is just asking when he heard it without asking what it was that he heard.

Q. When do you recall that you first heard of any injury to Mr. Nitey's back in working with you?

A. When I read in the newspaper about the case.

Mr. Sharp: I think the plaintiff may inquire.

Mr. Glasby: I have no inquiries.

FRANK E. MILLER

called as a witness by the defendant, after being first duly sworn testifies as follows: [128]

Direct Examination

Q. (By Mr. Sharp): Dr. Miller, are you a chiropractor? A. Yes.

Q. And where have you practiced?

The Court: Do you admit his qualifications as a chiropractor?

Mr. Glasby: I would like to know a little more about him.

The Court: Very well, go ahead with your examination, I thought I could save a little time.

Q. Where have you practiced as a chiropractor?

A. At St. Maries and at Twin Falls, Idaho.

Q. Is there a license that you have to have to practice your profession?

A. Yes, sir, my license is C-16.

Mr. Sharp: Do you admit his qualifications now, Mr. Glasby?

Mr. Glasby: I will admit his qualifications as a chiropractor.

Q. Dr. Miller, do you know Mr. James Nitey?

A. Yes, sir.

Q. Have you ever treated Mr. Nitey?

A. Yes, sir. [129]

Mr. Glasby: I will now object as to the privileged communication.

(Testimony of Frank E. Miller.)

The Court: You object on the ground that he was a doctor who treated Mr. Nitcy and any testimony he would give would be privileged?

Mr. Glasby: Yes, your Honor.

Mr. Sharp: May I argue that question?

The Court: If the plaintiff does not want him to testify I don't think that I can permit him to testify here, but I will allow the jury to step out for a moment and I will hear you.

(Remarks of Court and counsel in the absence of the jury reported but not transcribed.)

The Court: You may call the jury, Mr. Bailiff.

(The following in the presence of the jury.)

The Court: I think it is a well established principle of law that a physician or surgeon cannot, without the consent of his patient, be examined as to any information acquired in attending the patient which was necessary to enable him to prescribe or to act for the patient. However, in this case the plaintiff himself took the witness stand and testified as to certain things that had taken place between this doctor and himself. I am satisfied that by doing so he waived the [130] requirement of this rule, the testimony, however, will be limited to only those matters to which the plaintiff has testified when he was on the stand and nothing more. Any further information that this doctor has which is objected to by the plaintiff would not be admissible here. You may proceed.

Q. Doctor, did Mr. Nitcy consult you for a back condition in 1947? A. He did.

(Testimony of Frank E. Miller.)

Q. Are you recollecting that out of memory or do you have any records that you want to refer to?

A. I have a daily file book and a record card.

Q. And you have consulted those, have you?

A. Yes, sir.

Q. And in addition to your memory you are relying on the records you have?

A. I am relying on my records.

Q. And in 1948 did the plaintiff consult you for a low back pain or condition? A. Yes.

Q. In 1950 did the plaintiff consult you for a low back pain or condition?

A. Yes, sir, that is right.

Mr. Sharp: That is all, Doctor.

Mr. Glasby: I have nothing to ask. [131]

JAMES J. DUPREE

called as a witness by the defendant, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Sharp): Dr. Dupree, are you a physician and surgeon, and M.D.?

A. Yes, sir.

The Court: Do you admit the doctor's qualifications?

Mr. Glasby: Yes, I will admit his qualifications as a physician and surgeon.

The Court: I think we all know him.

Mr. Sharp: There are one or two questions I would like to ask the doctor along that line.

(Testimony of James J. Dupree.)

The Court: Very well.

Q. Doctor, what position do you have with the Milwaukee Hospital Association?

A. I am chief surgeon.

Q. What type of patients do you have consulting the Milwaukee Hospital Association generally?

A. They are employees of the railroad company, the Milwaukee Railroad Company, generally, who are members of the hospital association and they are just the general run of patients, did you mean what are the complaints generally? [132]

Q. Yes.

A. Well, everything that is referred to me from Tacoma, Washington, to Mobridge, South Dakota.

Q. Does the medical association take care of employees for just accident cases, industrial accident cases or any general condition?

A. Any general condition, any sickness, any eye condition, dental condition or any medical or surgical problem that comes up, anything regarding any employee, regardless of whether it is an accident or not.

Q. Do you have other doctors working for you or under you? A. Yes.

Q. And are they assigned to districts or how is that handled?

A. We have our territory divided up into districts with a district surgeon and then we have the local surgeon under the district surgeon in each of the districts.

Q. Where is your main headquarters?

(Testimony of James J. Dupree.)

A. At Seattle.

Q. And do you have other doctors there?

A. Yes, sir.

Q. What kind of doctors are they, general practitioners?

A. No, they are generally specialists, surgical consultants, oculists, nose and throat consultants, dentists, orthopedic surgeons, medical specialists, neurological [133] specialists, any one of the specialties that is included in the field of medicine or allied studies.

Q. How does an employee use the Milwaukee Hospital Association?

The Court: I wonder if this is necessary, Mr. Sharp, I thought I eliminated any necessity for this, for the manner of handling this case.

Mr. Sharp: Perhaps that is true, your Honor, I will not go into it.

The Court: There is nothing for the jury to consider in regard to any treatment.

Mr. Sharp: That is right.

Q. Doctor, does your territory cover St. Maries, Idaho? A. Yes, sir.

Q. When an employee comes to work for the railroad, one who is classified as a laborer, is he given a physical examination? A. Not all of them, no.

Q. Why not?

A. Some of the organizations, the labor organization, have an agreement with the railroad that their employees are not given a pre-employment examination.

(Testimony of James J. Dupree.)

Q. Are you familiar, off hand, with whether a laborer at St. Maries would be given an examination prior to employment? [134]

A. No, sir.

Q. Have you ever had the name of James Nitcy appear on any reports? A. Yes, sir.

Q. These reports, where do they come from generally?

A. Well, through my office are cleared all of the reports from the district surgeons, showing the patients who have been treated by them or by any of the local surgeons in the district. All of these reports are sent to us each month in Seattle, through the general surgeon's office, for the purpose of paying bills and medical expenses.

Q. Will you state whether or not Mr. Nitcy's name appeared prior to 1950 on any of your medical reports?

A. Yes, I am quite sure it did.

Q. Doctor, have you yourself ever examined Mr. Nitcy? A. Yes, sir.

Q. In connection with what type of trouble or condition?

A. In 1952, for a back condition.

Q. Did he come to Seattle for that?

A. Yes.

Q. What type of examination did you give him?

A. Well, I examined him myself and I also had Dr. McConnvill, who is an orthopedic specialist, examine him.

Q. Any other doctor examine him? [135]

(Testimony of James J. Dupree.)

A. Well, he was examined by my associate who is an internist or a medical man, and also by the X-ray people in their department, all of the work was done that is generally done when a patient is in a hospital.

Q. Doctor, was this man placed in a hospital?

A. Yes, sir.

Q. And he was examined there? A. Yes.

Q. You stated that you had consulting doctors, did you confer with them?

A. Yes, sir, I did.

Q. And did your findings and those of your consultants agree on this man's diagnosis?

A. Yes, they did.

Q. Would you just tell the court and jury what you found about this man's back condition, in general terms?

A. As a result of our examination in which we considered X-ray and other laboratory tests,—the physical examination which done by myself, Dr. Peterson and Dr. McConnvill, we arrived at a diagnosis of chronic hypertrophic osteo arthritis which is just a description of arthritis, chronic arthritis. Osteo arthritis means that it involves the bone and hypertrophic means an excessive deposits of bone formed around the joints which make them painful.

Q. How does that condition usually occur, Doctor, how does [136] it come about?

A. Arthritis is a disease that occurs in most of us as we grow older, just the same as we lose our

(Testimony of James J. Dupree.)

teeth, we have to wear glasses, our hair turns grey, it is a degenerative disease and I presume that 95 per cent of the people have it in some form or other by the time they reach the age of 40. We don't know the exact causes, it can be caused by many things, such as chronic infection, nutrition as a child. Certain factors in our daily diet, metabolism, the use of the different forms of diets that are defective or deficient in some form, resulting in changes in the bone, in the bone physiology, so that these things occur. We don't know why it hits some people in a worse form or to a greater degree than others and some it passes by altogether.

Q. Does it occur in some people more than in others, say people who do hard physical work more than generally?

A. No, I wouldn't say so. My experience has been that a man who does heavy physical labor can have X-ray evidence of a severe arthritis and still have a minimal amount of complaint, whereas someone who worked as I do,—I work hard, but I don't do manual labor,—can become crippled with arthritis in fact a good many of our doctors are so crippled up that they are unable to [137] follow their profession. I don't think that it picks on any class or group of people at all. It is a disease, a condition that we see as a person becomes older.

Q. How does that show up on an X-ray, I mean how can you see it on an X-ray?

(Testimony of James J. Dupree.)

A. Well, it will show up in the X-ray in two different ways generally, one in which there is an excessive deposit of calcium which casts a shadow when the X-ray is made, it casts a shadow between the joint surfaces. Another form or type of arthritis is one in which the joint faces decreases in size so that the range of motion becomes less than it formerly was, and when that occurs, the ligaments and the soft part that holds the bones together shrinks too and do not allow as much movement and when a movement is made it is painful.

Q. I believe you said that you had X-ray taken of Mr. Nitey's back? A. I did, yes.

Q. Did this condition show up on that X-ray?

A. It did.

Q. Unfortunately we don't have a shadow box but perhaps that light will be enough for you to show the jury.

The Court: These X-rays may be marked and admitted. Perhaps it would be a good idea to have [138] them in evidence before the doctor testifies as to them. They are Exhibits 6 to 9, defendant's exhibits.

A. There are four X-ray films here, the two large X-rays are films of the patient's back made while the patient was lying or standing up straight. They are what we call anterior-posterior position. The X-ray tube would be in front and make such an X-ray from anterior to posterior position. This X-ray shows that view, showing the lower part of the spine, some of the ribs and almost the entire

(Testimony of James J. Dupree.)

pelvis. Each vertebra is a box like bone. You may wonder what this white material is, this white material was apparently injected into the patient's back at a previous time, because we did not do that. These changes that have been talked about and that are seen here are these spurs, this one here (indicating), another spur here, one here, one here and here, there is also a tendency of the formation of one there (indicating). Those would be between one, two, three, four and five of the lumbar vertebra. Now, the other X-ray film is essentially the same view, the reason there are two is because they can be put in a stereopticon box, like the old fashioned stereopticon slide viewer so that you can get a third dimension. They are made just the same as the other except that there is a slight shift in the tube so that when it is put in the viewing box it will give a [139] third dimension.

Q. Something like the 3-D movie, Doctor?

A. Something similar.

Q. Now will you continue with your explanation, or your reading of the film?

A. This middle sized X-ray film is in the lateral position, the X-ray tube is positioned here (indicating) and the plate is positioned in this manner and we call that a lateral X-ray. This X-ray is one showing the lower part of the dorsal back and a few of the upper lumbar vertebra, in other words, where we see ribs attached those are dorsal vertebra and where there are no ribs attached those are lumbar vertebra, or what you refer to as the

(Testimony of James J. Dupree.)

small of your back. Now, in this film again, there is what we are discussing, here is a spur here, and here, there is a spur there, a spur there, and you can see a large spur there (indicating) showing that he has arthritis involving all vertebra as shown in that view. The smallest of these films is what we call a cone lateral view. This distinct circle (indicating), that is done with a cone placed on the X-ray tube. The X-ray is somewhat like a camera, when you take a close up you put a special lense on your camera and you do the same with the X-ray tube, and this is a cone view for the purpose of determining whether or not there [140] was an injury in this spot of the back where the patient complained of the injury. The injury could have been a slippage of the vertebra,—this is the pelvis (indicating), the spine rests on the pelvis and quite often we see that slipped off. In this view there is no displacement whatever, there is a little spur here and here and there is some dif-fused arthritis in this joint, in this joint, which is known as the lumbar sacro joint.

Q. Doctor, you have been handed another X-ray, I think the testimony shows that was taken on February 14? A. Yes, February 14, 1950.

Q. Can you see any evidence of arthritis there, Doctor?

A. Yes. Unfortunately there are only two ver-tebra showing on the film but there is definitely a spur here (indicating), the same one that we saw before. Now, if I may have the other film I can

(Testimony of James J. Dupree.)

demonstrate that for you. If you can fix in your mind this spur here and one up here (indicating) and now, you can see the spur here almost identical to this, and these films are dated February 6, 1952.

Q. Now, Doctor, you looked at that one dated February of 1950, how long would it take that condition to occur or a condition like that?

A. Do you mean arthritis? [141]

Q. You pointed out some spurs, how long would it take that condition to occur?

A. That is hard to say because these changes start the day that you are born but they don't show up in X-ray except in very unusual cases until a person reaches about the age of 40 and then they may not show up in any changed form for a good many years after that. They may reach the maximum state of development, but to produce spurs of that kind, as indicated on the film, it has taken I would say at least ten years, it has probably taken 10 or 11, maybe more years than that.

Q. At any rate more than four days?

A. Yes.

Mr. Sharp: That is all, Doctor.

Cross Examination

Q. (By Mr. Glasby): Doctor, you have mentioned that disease causes this arthritis?

A. Yes.

Q. Are there any other causes besides disease?

A. I mentioned dietary and nutritional defects, of course, those are forms of disease.

(Testimony of James J. Dupree.)

Q. Is it possible for trauma to aggravate such condition?

A. Well, it is possible for trauma to momentarily, and by [142] momentarily I mean for a period of a few days after a person has received, say an injury such as a fracture in and about one of these places or a dislocation or a severe contusion or a twist, it is possible for those joints to become sore if arthritis is present, but it is also possible for them to become sore if arthritis is not present. If I were to answer your question and state my honest opinion I would say that whatever opinion a doctor or physician may draw would be simply arm chair reasoning, I mean, I have no proof, I could not prove nor could I disprove that twisting or a fracture or an injury of any sort could either aggravate or not aggravate arthritis.

Q. Out of this vast field of people that have arthritis or an arthritic condition, would you even care to venture an appraisalment or an opinion as to the number caused by disease or caused by trauma?

A. I have never seen arthritis caused by trauma.

Q. You have seen it aggravated?

A. I have seen it, where a person would be incapacitated for a few days or weeks by virtue of injury, I would again have to say that I would not be able to state with any definite proof that his disability or his inability to work or his complaint was due to arthritis, that is, an aggravation of his arthritis, or whether they [143] were due to an

(Testimony of James J. Dupree.)

injury that may have occurred. My experience is that wherever a person has arthritis and he has some minor injury that ultimately it gets well enough so that he can go to work and does. On the other hand, people who have progressive disease keep on getting worse and worse until eventually many of them fortunately not a great many, because if it did we would all be crippled, they get so they cannot work at all. They are unable to do that type of work, I mean, labor, that is what I had in mind.

Q. Doctor, is the 11th dorsal shown on the X-ray? A. On my film, yes.

Q. I wonder if you would show me that, please?

A. Yes. We have to identify this as a lateral view, the last vertebra that has a rib attached. This is the last vertebra that has a rib attached to it which means it is the 12th dorsal so the 11th would be just above that, this would be the 11th (indicating).

Q. Do you detect anything unusual about that?

A. Yes. In this instance he has a complete bridging across, which is characteristic here (indicating), the spur here joins up with the 10th.

Q. Is that the only irregularity?

A. Yes, that is the only one I see. [144]

Mr. Glasby: I would like to have this film marked as an exhibit and show it to the witness.

The Court: This is rather irregular, this should have been placed in evidence in your case in chief if you wanted it introduced.

(Testimony of James J. Dupree.)

Mr. Glasby: I will withdraw it.

Mr. Sharp: If they are films of this man's back we would like to see them but I think that you should make your record properly.

Mr. Glasby: I will withdraw them.

I think that is all.

Redirect Examination

Q. (By Mr. Sharp): Mr. Glasby asked you in connection with trauma, and I believe you mentioned in connection with the trauma condition fractures, twists, and contusions, and I believe you said they might cause some aggravation of a pre-existing arthritic condition, did you find any evidence of a contusion, a fracture or a twist in this man's back? A. No, I did not.

Q. And I believe that you stated that you had never seen arthritis caused by trauma?

A. That is right. [145]

Mr. Sharp: I think that's all.

Mr. Glasby: That is all.

Mr. Sharp: I think that all the exhibits are in.

The Court: Yes, I think so, the clerk will check on those.

Mr. Sharp: The defendant rests at this time and we would like to renew the motion made at the end of the plaintiff's case.

The Court: Do you have any rebuttal, Mr. Glasby?

Mr. Glasby: None.

The Court: The jury may be excused at this time for 15 minutes. (In the absence of the jury.)

The Court: The record may show that the motions are renewed. Do you wish to add anything to your motions?

Mr. Sharp: None other than I don't think that Mr. Bogardis showed any kind of negligence on the part of the railroad, he just reiterated what the evidence of the plaintiff had already shown. The plaintiff's evidence shows that this was the customary and usual method of handling this oil barrel, it shows no objection on the part of the plaintiff, no injury at [146] that time that he knew of.

The Court: In view of the rules of Federal procedure that gives the Court further control over this motion I may overrule the motion or deny it and let the jury pass upon this, I have not made up my mind at the moment, but counsel may come into my chambers now and go over the instructions with the Court.

The Court: I will overrule the motion, as I said before the Court has control of this matter and can give it further study. I am going to submit this matter to the jury. I think that 30 minutes on a side should be sufficient, 20 minutes would be better but you may have 30, and you may proceed with your argument.

(Argument of counsel to the jury.)

Instructions of the Court

This action is brought by the plaintiff, James Nitcy, against the defendant Chicago, Milwaukee, St. Paul and Pacific Railroad Company, in which

the plaintiff alleges that one Harry Bogardis, an employee of the defendant, was negligent in the handling of a barrel of oil and because of such negligence the plaintiff was injured. The defendant has filed its answer in which it denies this allegation of negligence and alleges that if the plaintiff was injured it was because of his own negligence, and that such negligence was the primary and sole cause of any injury which he may have received.

It becomes my duty as Judge to instruct you as to the law and it is likewise your duty as jurors to follow the law as I shall state it to you, on the other hand, it is your exclusive province to determine the facts in this case and to consider and weigh the evidence for that purpose. The authority vested in you is not an arbitrary power but must be exercised with sincere judgment and sound discretion and in accordance with the instructions which I shall give you.

You will disregard any statement made by counsel on either side which is not sustained by the evidence and you will likewise disregard any evidence which may have been offered and not admitted by the Court or any evidence which, after its admission was ordered stricken by the Court. Statements made by counsel either during the trial or in their arguments are not evidence and should not be considered as such. Your verdict must be based upon the evidence, and in arriving at it you should not consider or discuss anything in connection with this case except the evidence received at the trial. It is your duty to weigh the evidence

calmly and dispassionately, to regard the interest of the parties to this action as the interest [148] of strangers, and to decide the issues upon the merits and to arrive at your conclusion without regard to what effect it may have upon the future of the parties to the action.

This case is based upon a statute of the United States generally known as the Federal Employer's Liability Act, which provides that every common carrier by railroad, while engaging in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, for any injury resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier.

The Federal Act on which the plaintiff relied for recovery in this case, requires that before the plaintiff can recover he must establish, by a preponderance of the evidence, the negligence alleged in the complaint. This negligence has been limited to only question, and that question is: Was Harry Bogardis negligent in handling the oil drum in question, in failing to keep said drum in upright position? If you find that he was not negligent in this regard, you will go no further in your consideration of this case, and you should find for the defendant.

By a preponderance of the evidence is not necessarily meant a greater number of witnesses, but [149] a greater weight of the evidence. That is what the word preponderance means, evidence which convinces you that the truth lies upon this

side or that, it is that which is more convincing, more persuasive. The burden therefore is upon the plaintiff in this case to show that the defendant was guilty of negligence in the respect charged in the complaint.

Unless you are satisfied from the evidence that (1) the barrel was dumped on its side by the plaintiff's fellow employee and, (2) that the act of dumping the barrel on its side was negligence and, (3) that such negligence caused the injury of which the plaintiff now complains, and, (4) that the method of handling the barrel was on this occasion different from the method ordinarily used, and, (5) that plaintiff complained to his superior that the job was too heavy, and (6) that his superior, notwithstanding this complaint, ordered him to go ahead and lift the barrel, you must find for the defendant.

The defendant's employee, Harry Bogardis, was bound to handle the barrel of oil in question only as a reasonably prudent person would handle it, and the plaintiff must be held to have understood the ordinary work required of a laborer in a railroad roundhouse, to have understood the nature of the physical duties that he would be called upon to perform, and if in this case you find that the [150] plaintiff sustained injuries as he claimed and that these injuries were the result of the ordinary physical work required of a laborer rather than the result of the negligence of Harry Bogardis, the employee of the defendant, then plaintiff is not entitled to recover.

Negligence is the failure to exercise reasonable and ordinary care. By the term reasonable and ordinary care is meant that degree of care that a reasonable and prudent person would exercise under the same or similar circumstances and condition. Negligence consists of the doing of some act which a reasonable and prudent man would not do under the same or similar circumstances or the failure to do something, some act that a reasonably prudent person would do under the same or similar circumstances. Negligence is never presumed but must be established by proof the same as any other fact in the case. By the phrase reasonable care or ordinary care is meant the exercise of that care and caution such as would be exercised by reasonably prudent persons under the existing circumstances. Ordinary care and reasonable care are relative terms and such care is proportionate to and commensurate with the danger involved. In other words, the greater the danger involved the greater is the care required, although there is but one standard of care and that is ordinary or [151] reasonable care as defined in these instructions.

You are instructed that contributory negligence is the failure to observe that degree of care which reasonably and prudent persons usually observe under the same or similar circumstances to protect themselves from injury and which by reason of such failure was the proximate cause of the injury complained of. You are instructed that the defendant can be held liable only for such as constituted

the proximate cause in whole or in part of the injuries complained of.

In order for the plaintiff to recover it must be proved to your satisfaction by a fair preponderance of the evidence that the defendant's negligence was the proximate cause, in whole or in part, of the injuries complained of.

There can be no recovery for disabilities existing before the accident. Therefore no recovery can be had for the effects of any disability which were not the natural or probable consequence of defendant's negligence. The question always is: Was there an unbroken connection between the wrongful act, if any, and the injury. In no event can damages be allowed except such as resulted directly from the negligence of the defendant. Damages produced by other agencies, before or after the accident, are not before you for consideration and you should not consider them in arriving at your verdict.

Proximate cause of an injury is that which in the natural and continuous sequence, unbroken by any new and independent cause produces an injury and without which the injury would not have occurred.

Industrial enterprise entails for all those engaged in it, certain physical exertions which no amount of care on the part of the employer can avoid. In applying the above principles to this case, in order to recover, plaintiff is required to prove by a preponderance of the evidence that the defendant was guilty of negligence which in whole or in part proximately caused the accident which plaintiff

complains of, and the injuries or damages resulting therefrom. If you find from a preponderance of the evidence, that the physical exertion, if any, to which the plaintiff was subjected and which caused his injuries, if any, could not have been avoided by the defendant in the exercise of reasonable care, then the plaintiff is not entitled to recover against the defendant.

You are instructed that the law recognizes in the ordinary affairs of life that accidents sometimes occur, which are, under all the circumstances not directly [153] and proximately attributed to the fault or neglect on the part of anyone, and are thus unavoidable. If any person be injured or sustain damages as a result of such unavoidable accident the law does not permit any recovery by the person so injured or damaged.

You are instructed that if after a full and deliberate consideration of the evidence, you believe that the accident complained of was an accident which, under all of the circumstances, was unavoidable, then there can be no recovery in this action.

You are instructed that the defendant was not the insurer of the plaintiff's safety. The plaintiff is not entitled to recover just because he was or may have been injured in the course of his employment. There is no presumption from the fact that the injury may have occurred, that it was caused by the negligence of the defendant. Before the plaintiff would be entitled to recover anything in this action he must prove by a preponderance of the evidence that the defendant was negligent

and that such negligence was the proximate cause, in whole or in part, of his alleged injury.

You are instructed that a person is never relieved from exercising ordinary care for his own safety, and cannot cast the burden of such care upon another. Therefore, if you find that the plaintiff [154] was aware that he had a weakened back condition and had been treating or treated for such condition prior to February 10, 1950, and that notwithstanding such condition he continued in his employment as a laborer, for the defendant, and performed the usual physical laboring tasks assigned to him by the defendant, without complaint, and particularly, if you find that the plaintiff knew of his back condition before February 10, 1950, and failed to complain of the task assigned to him on February 10, 1950, but instead performed the tasks, you should find that the defendant was not negligent in assigning him these tasks on these occasions.

If you are satisfied from the evidence in this case that any witness herein has wilfully testified falsely to any material fact or statement in this case you are at liberty to disregard his or her entire testimony except where you find that it is corroborated by reliable and truthful evidence.

If you find from a preponderance of all of the evidence in this case that the defendant was negligent and that its negligence was the proximate cause of the alleged injury to the plaintiff then the defendant is liable in damages although the defendant's negligence was not the sole ap-

proximate cause of the alleged injury to the plaintiff. If you further find that the plaintiff [155] was guilty of contributory negligence, this fact shall not be a total bar to recovery, but the damages may be diminished by you in proportion to the amount of negligence attributable to the plaintiff.

If you find that the plaintiff is entitled to recover you must award him such damages as you feel would compensate him for the loss proved to have been sustained by the plaintiff and proximately caused in whole or in part by the defendant's negligence, as alleged in plaintiff's complaint, and in estimating the amount of such damages you will consider the nature, expense and severity of plaintiff's injury, if any, the loss of wages and the loss of future earnings, and the impairment of earning capacity, if any, his loss of power and capacity to work, if any, and the effect upon his future, if any, insofar as caused by the injury or injuries proven. If your verdict is for the plaintiff, you should fully and fairly compensate him for all loss and damage approximately caused, in whole or in part, by the defendant's negligence. If after deliberating on this matter you determine that the plaintiff is entitled to recover, you should determine the amount by an open and frank discussion among your members and you should not arrive at any amount by each stating an amount that you think should be allowed and then [156] adding the several amounts and dividing the total by 12 or by any number taking part in such method, this

would be a quotient verdict and you should not, under your oath, arrive at such a verdict.

The fact that the court has instructed you upon the measure of damages is not to be taken by you as any indication on the part of the Court that it believes or does not believe that the plaintiff is entitled to recover damages. This instruction is given to you solely as a guide to you in arriving at your verdict only in the event that you find from the evidence and from the instructions given you by the Court that the plaintiff is entitled to recover. If you find from the evidence and the instructions of the Court that the plaintiff should not recover then you will disregard entirely the instructions that have been given you concerning the measure of damage.

The plaintiff and defendant come into court as equals and you should treat them as such. The fact that one of the parties is a corporation and the other an individual should make no difference to you and you will, in your deliberation, not allow any sympathy, prejudice or passion to sway you in the least. They have no place in the trial of a law suit, and you should arrive at your verdict from the evidence submitted to you from [157] the witness stand and the instructions given you by the Court.

In this Court it is necessary that you all agree in arriving at a verdict. When you retire to deliberate you will elect one of your number as foreman and when you have agreed upon a verdict your foreman alone will sign the verdict. Forms of ver-

dicts have been prepared for your use and you will have no trouble in using the verdict which correctly reflects your finding. You will see that one form contains a blank space in which you will insert the amount of damages you allow in the event you find for the plaintiff. If you find for the defendant another form has been prepared in which there is no blank space and in this event you will use the verdict without the blank space. When you arrive at a verdict it will be returned into open court. It will be necessary to ask you to retire from the courtroom for a moment as I have a matter concerning the law which I must take up with counsel. You will be recalled in just a moment or two.

(The following in the absence of the jury.)

The Court: Does the plaintiff want to register any exceptions to the instructions of the Court?

Mr. Glasby: Yes, the plaintiff excepts to the instruction given by the Court on the necessity [158] of the complaint as it was given,—as was stated in citing the Montana case,—I take exception to the giving of that instruction.

The Court: Does the defendant have any exceptions?

Mr. Sharp: The defendant has no exceptions to the instructions given.

The Court: The bailiff may be sworn.

The Court: You may recall the jury. Mrs. Rief, the alternate juror, you may be excused until 10:00 o'clock tomorrow morning, and the jury will now retire to consider its verdict. [159]

[Endorsed]: Filed July 2, 1954.

[Endorsed]: No. 14421. United States Court of Appeals for the Ninth Circuit. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, Appellant, vs. James A. Nitcy, Appellee. James A. Nitcy, Appellant, vs. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the District of Idaho, Northern Division.

Filed: July 8, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

Defendant but did show that the alleged injury, if it did occur, was caused solely by the negligence of Plaintiff himself.

5. The Court erred in attempting to order a New Trial without setting forth the grounds thereof in its order, and therefore said order for New Trial is ineffective and invalid and the original Judgment entered is still in effect.

6. The Court erred in refusing to set aside the Verdict of the jury and the Judgment entered thereon because said verdict and Judgment entered thereon are contrary to the clear weight of the evidence and represent a miscarriage of justice.

Dated this 17th day of July, 1954.

B. E. LUTTERMAN,
CHAS. F. HANSON,
/s/ MORELL E. SHARP,
Attorneys for Defendant-Appellant

Certificate of Service attached.

[Endorsed]: Filed July 19, 1954. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL
(Cross-Appeal)

Now comes the Cross-Appellant, James A. Nitey, and sets forth the points on which he intends to rely on appeal.

1. The Court erred in ordering a new trial on Plaintiff's first count.

2. The Court erred in failing to overrule Defendants' motion for new trial on Plaintiff's first count but should have ordered a new trial for the damages incurred on the counts in Plaintiff's complaint which were withdrawn from the consideration of the jury, and should have allowed the judgment to stand as to Plaintiff's first count.

3. The Court erred in considering Defendants motion for judgment N.O.V. or directed verdict or new trial for the reason that such motion did not specify purported errors.

Dated this 22nd day of July, 1954.

/s/ ROBT. V. GLASBY,

Attorney for Plaintiff-Appellee and
Cross-Appellant

Acknowledgment of Service attached.

AFFIDAVIT AND MOTION

State of Idaho,

County of Kootenai—ss.

Robert V. Glasby, being first duly sworn, deposes and says:

I. That he is Attorney for Plaintiff-Cross-Appellant in this action.

II. That due to the indigence of Plaintiff-Cross-Appellant, he was unable to obtain a transcript of the proceedings and therefore affiant was unable to

quote the ruling of the court in totidem verbis regarding the striking of all counts in Plaintiff's complaint but the first count which was stated as error in Plaintiff-Cross Appellant's "Statement of Points."

Wherefore, Plaintiff-Cross-Appellant prays that this honorable Court permit an amendment of his "Statement of Points" when he has an opportunity to inspect a transcript to state more fully his specification of error regarding the striking of counts in his complaint.

/s/ ROBT. V. GLASBY

Subscribed and sworn to before me this 22nd day of July, 1954.

[Seal] /s/ HAROLD S. PURDY,
Notary Public for State of Idaho. Residing at
Coeur d'Alene, Idaho.

[Endorsed]: Filed July 24, 1954. Paul P. O'Brien,
Clerk.